(24,042)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 350.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 28, 1914.

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1 I. *Petition and Exhibits. Filed Aug.* 10, 1897.

In the Court of Claims.

No. 20861.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Claimant,
v.
THE UNITED STATES.

Original Petition.

[Filed August 10, 1897.]

To the Honorable Chief Justice and Judges of the Court of Claims:

The petition of the William Cramp and Sons Ship and Engine Building Company respectfully represents:

I.

That it is a citizen of the United States and of the State of Pennsylvania, being a body corporate and politic duly incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building; that its yards, plant, and works are located in the city of Philadelphia, in the State of Pennsylvania.

2 II.

That on the 18th day of November, A. D. 1890, your petitioner, in conformity with the laws of the United States in that behalf, entered into a contract with the United States, through its Secretary of the Navy, for the construction of a sea-going coast-line battleship, designated as No. 2 and subsequently named the Massachusetts, according to the specifications attached to said contract, at and for the sum of $3,063,000, a copy of which contract is hereto annexed, marked Exhibit W. C. & S. No. 1, and prayed to be read as part hereof.

III.

That according to the terms of said contract the said battleship Massachusetts was to be completed and delivered to the United States within three years from the date of said contract, and certain onerous penalties were reserved to be imposed upon your petitioner in the event that the completion and delivery of the said vessel was delayed beyond that period through the fault or delay of your petitioner.

IV.

That by the terms of said contract it was provided that the United States should furnish, within the times and in the order necessary

to carry on the work properly, all the armor, armor bolts, and their accessories to be used in the construction of the vessel (except that required for the construction of the protective deck), your petitioner being required to furnish the working drawings and templates necessary for the construction of the armor within ten months from the date of the contract.

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V.

That immediately upon the signing of said contract your petitioner proceeded to prepare the necessary working drawings and templates according to the design of said vessel, and promptly furnished them to the Navy Department, but the Department decided to use nickel steel in the construction of the armor, which it was found could not be bent to the contemplated curves, and the said plans and templates were thereby rendered useless, and new sets of both had to be prepared, yet, notwithstanding, your petitioner supplied the second set within the time required by the said contract.

VI.

That your petitioner also commenced work on the said vessel and organized a corps of competent and skilled mechanics and proceeded vigorously with the work, so that the vessel had on or about the 4th day of November, 1891, reached a stage of progress at which the delivery of the diagonal armor plates became imperatively necessary; yet, notwithstanding the United States was kept constantly advised and urged to furnish the same, none were furnished until about October 21, 1892, and their delivery was not completed until January 3, 1893; that the delivery of other armor was unreasonably delayed; that for the armor belt being begun May 24, 1895, more than a year after it was needed, and finished September 27, 1895; more than a year was consumed in Harveyizing the plates after they had been finished according to the original plan, growing out of the decision of the Department to substitute the Harveyized plates for the original plates; that other

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necessary material was not furnished until October 30, 1895, which delayed the completion of the vessel until June 10, 1896, causing a delay of two years and six months, occasioned by the failure of the United States to perform the stipulations of the said contract on its part to be performed.

VII.

That by reason of the said several delays and defaults on the part of the United States your petitioner was put to great extra cost and expense and subjected to great loss and damage by being stopped and interrupted in its work and making it necessary for it to provide special arrangements in shops for tools and appliances, preparing an extra dock and keeping the same in repair for two years; for the care and maintenance of said vessel, including coal, wages, covers, extra painting, tug hire, and other like expenditures during said period.

VIII.

That by reason of said delays your petitioner, as required by the eighth paragraph of the contract, was compelled during all the additional period of time to keep the vessel insured against loss by fire and pay additional premiums therefor, and to borrow money to carry on the work and pay interest therefor by reason of being deprived of the payments that would have otherwise accrued to it and which would have rendered the payment of said interest by it unnecessary, and was also deprived of the sum of $100,000 earned by it as a speed premium for which it is entitled to interest during said delay.

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IX.

That on or about the 13th day of August, 1894, your petitioner applied for an official trial trip for said vessel, and that there had been earned by your petitioner, and there was then justly due to your petitioner, a very large sum of money, for the want of which your petitioner had been compelled to borrow money at abnormal rates of interest, and large losses and damages had accrued to your petitioner by reason of some of the delays hereinbefore set forth; but the Secretary of the Navy, while admitting and confessing that the delays in the completion of the vessel had been brought about by the default of the United States, and that losses and damages had accrued to your petitioner by reason thereof, unconscionably, unreasonably, and unlawfully, and taking advantage of the financial necessities of your petitioner, and to coerce your petitioner into a relinquishment of its claim for damages that had then accrued to it by reason of the delays and defaults of the United States, refused to permit a trial trip for said vessel, and refused to pay to your petitioner any of the sums of money then earned and due to it unless your petitioner would agree to release its claim upon the United States on account of said losses and damages.

X.

That thereupon and under the said unlawful coercion and duress imposed by the said Secretary of the Navy upon your petitioner your petitioner did sign and deliver to the said Secretary of the Navy an agreement of said character, a copy of which is hereto annexed and marked Exhibit W. C. & S. Nos. 2 and 3, and prayed to be read as part hereof.

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XI.

But your petitioner avers that no consideration for said release was given by the said United States and no money was paid to your petitioner other than moneys that had been earned by your petitioner and which were arbitrarily and unlawfully being withheld, and your petitioner avers that said pretended release, having been secured by coercion and duress and without consideration, is utterly null and void and of no effect or legal force, and your petitioner prays

that under the equity powers of the court the same may be annulled, cancelled, and set aside.

XII.

Your petitioner further says that it fully complied with and completed its said contract and did all the work and extra and additional work required and ordered to the satisfaction of the United States, and the said vessel was delivered and accepted by the United States on or about the 10th day of June, 1896, and that but for the delays heretofore set forth the same would have been completed and delivered on or before the 18th day of November, 1893.

XIII.

That by reason of said delays as aforesaid your petitioner has suffered the losses and damages as follows, to wit:

For time and organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$150,000.00
For special wharfage, 920 days at 1 cent per ton per day	94,300.00
7 For general care and maintenance of vessel, including coal, firemen, engineers, watchmen, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 920 days at $135 per day	$124,200 00
Additionel cost of insurance	34,316.27
Interest on money borrowed caused by delays of United States, which prolonged final settlement	65,607.89
Interest, 920 days at 6 per cent. on speed premium earned, $100,000	15,333.33
Total	$483,757.49

The premises considered, your petitioner prays judgment against the United States in this behalf for the sum of four hundred and eighty-three thousand seven hundred and fifty-seven dollars and forty-nine cents ($483,757.49) and the costs of this suit.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*
JNO. C. FAY,
Attorney for Claimant.

JOS. K. McCAMMON,
EPPA HUNTON,
C. E. CREECY.
Of Counsel.

STATE OF PENNSYLVANIA,
County of Philadelphia:

Charles H. Cramp, being duly affirmed, says that he is the president of the William Cramp and Sons Ship and Engine
8 Building Company, a corporation of the State of Pennsylvania, the claimant in the foregoing petition; that he has heard read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge and belief and that no assignment of the said claim has been made.

CHAS. H. CRAMP.

Subscribed and sworn to before me this ninth day of August, A. D. 1897.

[SEAL.]

ISAAC ARROTT,
Notary Public.

9 EXHIBIT W. C. & S. No. 1.

Contract for the Construction of a Sea-going Coast-line Battleship of About 10,000 *Tons Displacement.*

"Coast-line Battleship No. 2."

Contract, of two parts, made and concluded this 19th day of November, A. D. 1890, by and between The William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the President of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part.

Whereas, the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," approved June 30th, 1890, authorized the construction of three sea-going coast-line battleships, to be constructed in accordance with certain provisions contained in the act entitled "An act to increase the Naval establishment," approved August 3d, 1886, and to be, in all their parts, of domestic manufacture;

And whereas, after due advertisement, the proposal of the said party of the first part for the construction of the hull and machinery of two of said vessels, including fittings and equipment, and the fitting, fixing, placing, and securing of all their armor, one of which vessels is, for the purposes of this contract, designated and known as "Coast-line Battleship No. 2," has been duly accepted by the Secretary of the Navy;

And whereas the drawings, plans, and specifications re-
10 quired by the said acts have been duly provided, adopted, and approved, in accordance with the provisions of said Act of June 30th, 1890:

Now, therefore, this contract witnesseth that, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for itself and its successors and assigns, and its legal representatives, does hereby covenant and agree to and with the United States as follows, that is to say:

First. The party of the first part will, at its own risk and expense, construct, in accordance with the provisions of the acts of Congress relating thereto, and in conformity with the aforesaid drawings, plans, and specifications, one sea-going coast-line battleship of about ten thousand tons displacement, with fittings and equipment as specified, of the following principal dimensions:

	Feet.	Inches.
Length on load line	344	00
Extreme breadth	69	00
Depth in hold from top of main-deck beams to inner bottom	33	00

such vessel to be constructed of steel, of domestic manufacture, and to be provided and fitted with machinery, engines, and boilers, also of domestic manufacture, complete in all their parts, appurtenances, and spare parts, and in all respects as described in the annexed drawings, plans, and specifications, and in the aforesaid acts of Congress, and will deliver the same at the Navy Yard, League Island, Pennsylvania, to such person as the Secretary of the Navy may designate; it being, however, expressly understood and agreed that if any article or thing included in, or covered by, the drawings, plans, and specifications aforesaid shall be found, during the prosecution of the work under this contract, to be not pro-
11 duced or manufactured in the United States, and if, after reasonable effort, it shall be found impracticable to obtain the same as an article of domestic manufacture, then and in such case provision shall be made, by or with the approval of the Secretary of the Navy, for such alteration in the drawings, plans, and specifications, or for the adoption of such new or different device or plan as may be found necessary in order to carry out and complete this contract, subject, as to increased or diminished compensation by reason of such change, to the conditions applicable to changes as expressed in the second clause of this contract.

Second. The construction of the hull and machinery and the fittings and equipment of the vessel herein contracted for shall conform in all respects to and with the drawings, plans, and specifications, above referred to, which drawings, plans, and specifications are hereto annexed and shall be deemed and taken as forming part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for,

or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the drawings, plans, and specifications aforesaid shall not be changed in any respect, when the cost of such change shall, in the
12 execution of the work, exceed five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; that, if changes are thus made, the actual cost thereof, and the damage, if any, caused thereby shall be ascertained, estimated, and determined by a board of naval officers, appointed by the Secretary of the Navy; that the party of the first part shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation which the said party of the first part shall be entitled to receive, if any, in consequence of such change or changes, and that if all the changes authorized increase the cost of constructing the vessel, and premiums are earned under this contract by the party of the first part, such of said increased cost, as results from changes tending to increase the speed of the vessel, shall be deducted from such premiums in the final settlement under this contract.

Third. The party of the first part will, within ten months from the date of this contract, furnish all working drawings and templates necessary to show the dimensions and shape of each and every armor-plate required for use in the construction of the vessel herein contracted for, including those to be used in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and in the protection of the guns and loading positions, and the position and sizes of the bolt-holes therein,—the spacing and dimensions of said bolt-holes to be in accordance with the specifications and subject to the approval of the Secretary of the Navy; it being expressly understood and agreed that the party of the first part shall furnish all the armor, armor bolts, and their accessories, and all the labor and material required in the construction of the protective deck; that the party of
13 the second part shall furnish all other armor, armor bolts, and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template sizes and shapes within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by said approved drawings and templates, and deliver said armor, armor-bolts, and their accessories, at such reasonable place or places in the ship-yard of the party of the first part, as may be designated by the party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the first part shall, at its own risk and expense, properly fit, fix, place, and secure all the armor to the vessel, including the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and protection of the guns and loading positions, and furnish all

other materials and labor required in the construction of said vessel and her machinery, fittings, and equipment, as called for by the aforesaid drawings, plans and specifications; provided, however, and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side-belt, casemate, turrets, redoubts, barbettes, and conning-tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract,
14 and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side-belt, casemate, turrets, redoubts, barbettes, and conning-tower, shall be fulfilled the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor for the side-belt, casemate, turrets, redoubts, barbettes, or conning-tower when the vessel is ready for her final trial, or within five months after either a preliminary of a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing, and securing the armor for the side-belt, casemate, turrets, redoubts, barbettes, and conning-tower shall be ascertained, estimated, and determined by a board of Naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in the final settlement under this contract; but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side-belt, casemates, turrets, redoubts, barbettes, or conning-tower of said vessel prior to her final trial, or within five months after either a preliminary or conditional acceptance of the vessel, the party of the first part shall fit, fix, place, and secure all the armor to the vessel in accordance with the requirements of this contract and the drawings, plans, and specifications hereto annexed.

Fourth. The materials and workmanship used and applied in the construction of the hull, machinery, fittings, and equipment of the vessel herein contracted for, and in the fitting, placing, and securing of her armor, in details and finish, shall be first class
15 and of the very best quality, and shall, from the beginning to the end of the work, be subject to the inspection of the Secretary of the Navy; it being hereby expressly understood, covenanted, and agreed that the said Secretary may appoint suitable Inspectors, to whom the party of the first part shall furnish such samples, and such information as to the quality thereof and the manner of using the same, as may be required, and also any assistance such Inspectors may require in determining the weight and quality of steel and other metals, and of wood and other materials, either used or intended for use in the construction of said vessel,

her machinery, fittings, or equipment, or in the fitting, fixing, placing, and securing of her armor, and that the Inspectors may, with the approval of the said Secretary, peremptorily reject any unfit material or forbid the use thereof. The Inspectors shall, at all times during the progress of the work, have full access thereto, and the party of the first part shall furnish them with full facilities for the inspection and superintendence of the same.

Fifth. The steel to be used in the construction of the hull (including the protective deck), machinery, and appurtenances of the vessel herein contracted for, except that used in the construction of her armor, shall conform to the "Specifications for inspection of steel for use in the construction of the hulls and machinery of Coast-line Battleships Nos. 1, 2, and 3, and Cruiser (Protected) No. 12, for the United States Navy," approved by the Secretary of the Navy under date of September 1st, 1890, which specifications are annexed to and form a part of this contract.

Sixth. The party of the first part will, at its own expense, prepare such plans or drawings as may be necessary during the progress of the work, and will submit the same to the Navy Department for approval before the material is ordered or the work commenced.

Seventh. The party of the first part, in consideration of
16 the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for, or on account of, the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of the hull, machinery, fittings, or equipment of said vessel, or any part thereof, or in fitting, fixing, placing, and securing her armor, under this contract, and to protect and discharge the Government from all liability on account thereof, or on account of the use thereof, by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Eighth. The hull, machinery, fittings, and equipment of the vessel herein contracted for, and all materials and appliances provided for and used, or to be used, in the construction thereof, shall be kept duly insured, which insurance shall be renewed and increased, from time to time, by and at the expense of the party of the first part, the loss, if any, to be stated in the policies, as payable to the United States; the insurance to be effected in such manner and in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed, from time to time, by him, not exceeding the amount of advance payments made under this contract.

Ninth. The vessel herein contracted for, including her hull, machinery, fittings, and equipment, with all her armor fitted, fixed, placed and secured, as aforesaid, shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract; but the lien of the United States upon said hull, machinery, fittings, and equipment, and the materials on hand for use in the construction of the vessel,
17 respectively and collectively, for all moneys advanced on account thereof, shall commence with the first payment, and

shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach, from time to time, as the work progresses, and as further payments are made, and shall continue until it shall have been properly discharged. In case the completion of the vessel, her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, as aforesaid, shall be delayed beyond the said period of three years, deductions shall be made from the contract price of the vessel for each and every day (excepting Sundays) during the continuance of such delay, and until the vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, shall be completed and ready for delivery to the United States, as follows, viz: During the three months next succeeding the expiration of said period, seventy-five dollars ($75) per day; during the fortieth, forty-first, and forty-second months from the date of this contract, one hundred and fifty dollars ($150) per day; and for each and every day (excepting Sundays) during which such completion shall be delayed beyond the period of three years and six months from the date of this contract, two hundred dollars ($200) per day—all such deductions from the contract price of the vessel to be made, from time to time, from any payment or payments falling due under this contract; provided, however, that such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand-out of workmen employed in the construction of the hull, machinery, fittings, or equipment, of said vessel, or in the fitting, fixing, placing, and securing of her armor, or by other circumstances beyond the control of the party of the first
18 part; but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified; provided, further, that in case of any such alleged delay, the party of the first part shall give immediate notice thereof in writing to the Secretary of the Navy.

In case any question shall arise under this contract, concerning premiums over and above, or deductions from, the contract price of the vessel herein contracted for, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon the parties to this contract.

All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel; provided, however, that no delay, attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the party of the first part shall, at the time of the occurrence of such delay, notify him in writing of the facts and circumstances in each case, and of the extent to which the said party of the first part claims that the final completion of the vessel is thereby delayed.

Tenth. The party of the first part hereby further covenants and agrees that the vessel to be constructed under this contract shall be sufficiently strong to carry her armor, and the armament, equipment, coal, stores, and machinery prescribed by the Secretary of the Navy and indicated in the annexed drawings, plans, and specifications; that the total weight of said machinery, including engines, boilers, and appurtenances; all fixtures in engine and fire rooms; smoke-pipes; distilling apparatus; and water in boilers, condensers, pumps, pipes, and stern tubes;—but not including turret machinery, stores, heating apparatus, spare parts, tools in workshop, capstan, windlass steering gear or winches—shall not exceed eight hundred and seventy-five (875) tons, this weight to be determined from the certified records of the actual weight of the parts of the machinery as they are sent on board the vessel to be connected up, except the weight of the contained water, which shall be calculated from the actual volumes in steaming condition, as shown on the certified drawings of the completed machinery, the weight to be calculated for salt water except for those parts where fresh water only is used; that if said total weight (875 tons) be exceeded, a deduction of five hundred dollars ($500) per ton shall be made from the contract price of the vessel for each ton of excess weight over that stipulated (875 tons), and that if said weight (875 tons) be exceeded by five per cent., a further deduction of ten thousand dollars ($10,000) shall be made from the contract price of the vessel,—all such deductions to be made from any payment or payments falling due under this contract; and that when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment, and the speed of the vessel, and that such vessel shall be accepted only on fulfillment of, and subject to, the conditions and agreements hereinafter set forth:

(1.) That the working of the machinery in all its parts shall be to the satisfaction of the Secretary of the Navy.

(2.) The party of the first part hereby guarantees that the speed developed by said vessel upon said trial, under conditions prescribed or approved by the Secretary of the Navy, shall be not less than an average of fifteen (15) knots per hour, maintained successfully for four (4) consecutive hours, during which period the air pressure in the fire-room shall not exceed one inch of water,—the vessel to be weighted to a mean draught of twenty-four (24) feet, it being mutually understood, covenanted and agreed that for every quarter knot of speed so exhibited and maintained above said guarantee (15 knots) the party of the first part shall receive a premium, over and above the contract price of the vessel, of twenty-five thousand dollars ($25,000), and that for every quarter knot that said vessel fails of reaching said guaranteed speed (15 knots), there shall be deducted from the contract price the sum of twenty-five thousand dollars ($25,000).

(3.) That said vessel, including hull, fittings, machinery, engines,

boilers, and appurtenances, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, shall be found to be strong and well built, and well performed, and in strict conformity with the contract, drawings, plans, and specifications, and shall be approved by the Secretary of the Navy; provided, that if, at and upon said trial, there shall be any failure in the vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and the fitting, fixing, placing and securing of her armor to meet fully the requirements of this contract, the party of the first part shall be entitled to make further trials, sufficient in number to reasonably demonstrate
21 the capabilities of the vessel; and provided also, that the number of trials shall be determined and limited by the Secretary of the Navy, and that the expenses of a successful trial shall be paid by the party of the second part, but that any unsuccessful trial of the vessel or her machinery, prior to her "preliminary" or "conditional" acceptance, shall be at the expense of the party of the first part.

Eleventh. If, at and upon the trial trip before mentioned, the foregoing requirements and conditions relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor shall be fulfilled, and if the speed (15 knots) guaranteed as aforesaid shall be developed and maintained as aforesaid, then and in such case the vessel shall be preliminarily accepted, and payment of the last three instalments of the contract price of the vessel, and of all reservations, shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservations hereinafter provided for; but if the speed developed and maintained by said vessel, during such trial, shall fall below the speed (15 knots) guaranteed as aforesaid, she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel on account of her failure to reach the speed (15 knots) guaranteed as aforesaid; provided, however, that all the other requirements and conditions of this contract, relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor, shall have been fulfilled; and that, in case of such conditional acceptance, the twenty-eighth, twenty-ninth, and thirtieth instalments of the contract price of the vessel, and the reservations on payments
22 under this contract, shall constitute a reserve fund which shall be applicable to or towards the satisfaction of such deductions from the contract price, and shall be retained by the party of the second part for that purpose.

In case of a "preliminary" acceptance of said vessel, the said "special reserve" of sixty thousand dollars ($60,000), or in case of a "conditional" acceptance of said vessel, the said "reserve fund," or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been finally tried, after being fully equipped, armed (or weighted correspondingly), and in all respects complete and ready for sea,

under conditions prescribed or approved by the Secretary of the Navy; provided, that such final trial shall take place within five months from and after the date of the "preliminary" or the "conditional" acceptance of the vessal.

If, at and upon such final trial, or at any time within five months after either a "preliminary" or a "conditional" acceptance of said vessel, such final trial not having taken place, any weakness or defect in the hull, fittings, or equipment, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall appear, the same shall be corrected and repaired to the satisfaction of the Secretary of the Navy, and at the expense of the party of the first part; or if at any time during said period the machinery, or any part or parts thereof, shall be found to be defective in construction with respect to either workmanship or materials, or if there shall be any failure, breaking down, or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers, or appurtenances, the same shall be corrected and repaired, to the satisfaction of the Secretary of the Navy, at the expense of the party of the first part,
23 and the party of the first part may, if it so desires, have an engineer of its own selection present in the engine-room of said vessel at any time or times during said period, who shall have full opportunity to observe and inspect the working of the machinery in all its parts, but without any directing or controlling power over the same, and, in case such engineer shall be a civilian, his compensation shall be paid by the party of the first part.

If the vessel be not in readiness for such final trial within five months from the date of her "preliminary" or "conditional" acceptance, through no fault or delay on the part of the party of the first part, and no weakness or defects in the hull, fittings, or equipment, or in the machinery, including engines, boilers, and appurtenances, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall have appeared, then the vessel shall be finally accepted, and the said "special reserve," or the surplus, if any, of the said "reserve fund," paid, subject, however, to deduction on account of any reductions that may be made in the contract price of the vessel under the provisions of this contract.

Twelfth. The Department having provided, as foundation for this contract, drawings, plans and specifications of a vessel which it has reason to think would, if properly carried out, result in the production of a speed of not less than fifteen (15) knots per hour, assumes no responsibility with reference thereto, and will consider any changes suggested by the party of the first part, either as to hull or machinery, and, as the responsibility is with the party of the first part, will feel it to be its duty to deal liberally with any proposed changes, so long as the size, strength, and character of the vessel shall remain substantially the same; changes
24 in plans or specifications involving increased or decreased expense to be dealt with as provided for in the second clause of this contract.

Thirteenth. It is further mutually understood, covenanted, and agreed, that, in case of the failure or omission of the party of the first part, at any stage of the work prior to final completion, from any cause or causes other than those specified in the ninth clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited. The party of the first part shall thereupon, and on notice thereof, in writing, be, and the said party of the first part, does hereby, in consideration of the premises, for itself and its successors and assigns, and its legal representatives, acknowledge itself to be, justly indebted to the United States, as for liquidated and ascertained damages, in a sum equal to the aggregate amount of all advanced payments theretofore made to it for, or on account of, work done under this contract, and does further, as aforesaid, covenant and agree to refund the same on demand, or within sixty days thereafter, and that the United States shall and may hold, as collateral security for such refund, said vessel, machinery, materials, fittings, and equipment, or so much thereof as shall then have been constructed or furnished, or as shall be on hand for the purposes of construction. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or commenced in, upon, or about the hull, machinery, fittings, and equipment, of said vessel, and in the fitting, fixing, placing and securing of her armor, and of all materials on hand applicable thereto, the property of the party of the first part, and shall cause the same to be duly valued by a board, consisting of not less than five persons, qualified by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials and ascertain and declare the fair market value thereof, including a reasonable and customary margin of profit upon so much of the work as shall have been, at the time such forfeiture is declared, satisfactorily performed; and upon such examination the party of the first part may attend, and, if it so desires, by counsel, and submit such evidence as the board may deem proper.

Fourteenth. Upon receipt of the report and finding of said board, and upon his approval thereof, the Secretary of the Navy may, in his discretion, proceed to complete said vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, in accordance with the contract, drawings, plans, and specifications, using for that purpose all suitable materials on hand and included in the inventory aforesaid; and the title to said vessel, machinery, fittings, and equipment, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the United States; and the party of the first part does hereby, for itself and its successors, and assigns, and its legal representatives, covenant and agree to and with the United States, that, on receiving notice of the intention of the Secretary of the Navy to proceed to the com-

pletion of the work, it will surrender said vessel, machinery, fittings, and equipment, and all materials on hand, together with the use of the yard or "plant," and all machinery, tools, and appliances appertaining thereto and theretofore used or necessarily to be used in and about the completion of the work.

26 Fifteenth. In case the Secretary of the Navy shall proceed, under the foregoing clause, to complete the work, such procedure shall be without unnecessary delay, and shall be at the risk and expense of the party of the first part, which party shall be chargeable with any increase in the cost of materials or labor incurred by reason of its failure to perform this contract. Upon the final settlement of the liability of the party of the first part, an account shall be stated substantially as follows:

The party of the first part shall be charged—

1. With all advance payments.

2. With the extra cost, if any, of materials and labor, and all other extra expenses, if any, over and above the contract price, incurred in the completion of the work.

The party of the first part shall then be credited with the value of the work done up to the time of suspension, and of the materials on hand, as ascertained by the board, under the provisions of the thirteenth clause of this contract, and approved by the Secretary of the Navy, and with such advance payments, if any, as may have been refunded. If a balance shall thereupon appear in favor of the party of the first part, the same shall be paid to and accepted by the said party of the first part in full discharge of all claims under this contract; but if a balance shall appear in favor of the United States, the party of the first part hereby covenants and agrees as aforesaid to pay and discharge the same on demand.

Sixteenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that it shall not, under any circumstances, be obligatory upon the party of the second part to accept or pay for the vessel, or any part thereof, to be constructed under this contract, unless she shall have been completed in strict conformity with this contract, and in accordance with the

27 provisions of the acts of Congress relating thereto, and that this qualification shall be deemed and taken as applicable and applying to each and every clause, covenant, and condition, express or implied, in this contract contained.

Seventeenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that this contract shall not, nor shall any interest therein, be transferred by the party of the first part to any other person or persons.

Eighteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no member of or delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to members of or delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Nineteenth. The United States, in consideration of the premises,

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do hereby contract, promise, and engage, to and with the party of the first part as follows:

1. The contract price to be paid for the vessel, machinery, fittings, and equipment, to be constructed and furnished, in accordance with this contract, including the fitting, fixing, placing, and securing of her armor, shall be three million and twenty thousand dollars ($3,020,000), but if the length of the vessel be increased, the cost of such increase shall be added to such price.

2. Payments shall be made by the United States in thirty equal instalments, as the work progresses, with a reservation of ten per cent. from each instalment.

3. No payment shall be made except upon bills, in triplicate, certified by the Inspectors, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

5. The payment of the last three instalments shall not be made except as provided for in the eleventh clause hereof.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

Twentieth. If any doubts or disputes arise as to the meaning of anything in the drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds itself and its successors and assigns, and its legal representatives, to abide by his decision in the premises. The interlineation of the words "and continue with reasonable diligence" in the thirty-seventh line of this contract was made before signing.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING CO.,

By (signed) CHAS. H. CRAMP, *President.* [L. S.]

Attest:

HENRY W. CRAMP, *Secretary.*

THE UNITED STATES. [L. S.]

By (s) B. F. TRACY, *as Secretary of the Navy.*

(s) WM. B. REMEY,
Judge Advocate General,
as to B. F. Tracy, Secretary of the Navy.

30 EXHIBIT W. C. & S. No. 2.

Memorandum of Agreement Relative to Change in Contract for Construction of the Massachusetts, Dated October 5, 1894.

It is hereby agreed, by and between the William Cramp and Sons Ship and Engine Building Company, a corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, this fifth day of October, 1894, that the contract made on the 18th of November, 1890, between the parties hereto, for the construction of Coast-line Battleship No. 2, the Massachusetts, be altered and amended as follows, viz:

So much of said contract as provides for the payment to the party of the first part of the last three installments of the contract price, and of the amount reserved from the previous payments, only after a trial trip and a preliminary or a conditional acceptance of the vessel by the United States, is hereby rescinded and in lieu thereof it is hereby agreed, as part of said contract, that the party of the second part shall pay to the party of the first part so much of the aggregate amount of the last three installments of the contract price and of the amount of the reservations from previous payments as will leave in the hand of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars ($60,000) provided for in the eleventh clause of the contract, the cost of all unfinished work and all deductions likely to be made on account of deficiencies in speed and all contingencies that are liable to arise. But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being
31 made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part.

It is further stipulated and agreed that the said contract, as hereby modified, shall remain in all other respects unchanged and unaffected in its legal effect by said modification.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*

Attest: HENRY W. CRAMP, *Secretary.*

THE UNITED STATES,
By H. A. HERBERT, *Secretary of the Navy.*

SAM'L C. LEMLY,
Judge Advocate General,
As to H. A. Herbert, Secretary of the Navy.

32 The American Surety Co., of New York, a corporation doing business in the city of New York, surety on the bond dated November 21, 1890, accompanying the contract for the construction of Coast-line Battleship No. 2, the Massachusetts, mentioned in the foregoing agreement does hereby for itself and its successors and assigns and legal representatives, consent and agree to the modification of said contract as set forth in the foregoing agreement between The William Cramp and Sons Ship and Engine Building Company and the Secretary of the Navy, dated the fifth day of October, A. D. 1894.

In witness whereof, the vice-president and the assistant secretary of the American Surety Company of New York, have hereunto set their hands and affixed the seal of said Company, this fifth day of October, A. D. 1894.

AMERICAN SURETY COMPANY OF NEW YORK.
By HENRY D. WELSH, *Vice-President.*

[SEAL.] Attest:
STEPHEN W. WHITE,
Assistant Secretary.

33 EXHIBIT W. C. & S. No. 3.

Memorandum of an Agreement Relative to Change in Contract for Construction of the Massachuetts, Dated February 1, 1896.

It is hereby agreed, by and between the William Cramp and Sons ship and Engine Building Company, a corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, this first day of February, 1896, that the contract made on the 18th day of November, 1890, between parties hereto, for the construction of Coast-line Battleship No. 2, the Massachusetts, as altered and amended by the agreement between said parties dated October 5, 1894, be further altered and amended as follows, viz:

That the party of the second part shall pay to the party of the first part the sum of one hundred and fifty thousand dollars ($150,000), being part of the reservations withheld by the party of the second part under the provisions of the eleventh clause of the contract aforesaid. upon the execution by the party of the first part of a bond, with approved security, conditioned for the return to the party of the second part of the sum aforesaid upon demand being made therefor by the Secretary of the Navy for indemnity of the party of the second part against the loss or injury by reason of such payment; and

That in consideration of said payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with the contract aforesaid or on account of any delay hitherto occasioned

by the action of said party of the second part, and, further,
34 that the said contract as modified herein and by the terms of the agreement dated October 5, 1894, hereinbefore mentioned shall remain in all other respects unchanged and unaffected in its legal effect by said modifications.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO.,
By CHAS. H. CRAMP, *President.*

[SEAL.]
Attest: JNO. DOUGHERTY, *Secretary.*

THE UNITED STATES,
By H. A. HERBERT,
As Secretary of the Navy.

SAM. C. LEMLY,
As to H. A. Herbert,
Secretary of the Navy. [SEAL.]

The American Surety Company of New York, a corporation doing business in the city of New York, surety on the bonds, dated respectively, November 21, 1890, accompanying the contract for the construction of Coast-line Battleship No. 2, the Massachusetts, and October 5, 1894, accompanying the supplementary agreement of the date last above mentioned under said contract, does hereby, for itself, and its successors and assigns, and legal representatives, consent and agree to the modification of the contract aforesaid as set forth in the foregoing agreement dated the first day of February, A. D. 1896, between The William Cramp and Sons Ship and Engine Building Company and the United States, represented by the Secretary of the Navy; it being expressly understood and
35 agreed that nothing in this agreement or elsewhere shall be construed as invalidating or lessening the full force and virtue of the bonds above referred to.

In witness whereof, the vice-president of the American Surety Company of New York, has hereunto set *its* hand, and caused to be affixed hereto the seal of said Surety Company this first day of February, A. D. 1896.

By HENRY D. WELSH,
Vice-President.

[SEAL.] Attest:
STEPHEN W. WHITE,
Assistant Secretary.

36 2. *Traverse. Filed February* 13, 1911.

In the Court of Claims of the United States, December Term, A. D. 1913.

No. 20861.

THE WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY,
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

37 3. *Argument and Submission of Case.*

On February 13 and 14, 1911, Mr. John C. Fay was heard for the claimants. On February 14 and 15, Mr. Franklin W. Collins was heard for the defendants. On February 16, Mr. Fay closed for the claimants and the case was submitted.

38 4. *Findings of Fact as Finally Allowed by the Court and Conclusion of Law. Filed May* 29, 1911.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
v.
THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein is a corporation incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building, with its yards and plant and works located in the city of Philadelphia in said State.

II.

On November 19, 1890, the claimant entered into a contract with the United States, through their Secretary of the Navy, whereby, in

consideration of the sum of $3,063,000, to be paid as provided in said contract, it agreed to construct and complete within three years from said date, as in said contract provided, a seagoing coast-line battleship, designated as "No. 2," and subsequently named the Massachusetts, all in accordance with the specifications attached to and made a part of said contract, which contract, marked "Exhibit W. C. & S. No. 1," is annexed to and made a part of the petition herein.

III.

Immediately after the making of said contract the claimant arranged and systematized a working programme for the construction of said vessel by organizing its working force so as to cooperate with each other in harmony on coordinate work and to secure economy in the construction of the vessel within the contract time and to escape the penalties imposed thereby for delays. The claimant would have completed the vessel within the contract period if it had not been for the failure of the United States to furnish
39 materials within the time and in the order to properly carry on the work which by the terms of the contract they had agreed to furnish.

By reason of the failure of the defendants to furnish the materials, which, by the third clause of the contract, they had agreed to furnish within the time and in the order as aforesaid, the completion of the vessel was delayed for two years six months and nine days beyond the contract period.

The armor to be furnished in accordance with said clause of the contract was obtained by the defendants from other contractors, who, without any fault on the part of the claimant, failed to complete the manufacture thereof in time for the defendants to deliver the same to the claimants as they had agreed to do.

IV.

On May 29, 1896, and after the completion and delivery of the vessel at the time hereinafter stated, the Secretary of the Navy decided that the cause of delay for the period of two years, six months, and nine days in the completion of the vessel was due to the failure of the United States to furnish the claimant the materials contracted to be furnished by them within the time and in the order to properly carry on the work, and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the ninth clause of the contract, was on said date extended by the Secretary of the Navy a corresponding length of time, to wit, to May 29, 1896, on which latter date the vessel so contracted for was completed and delivered.

V.

On October 5, 1894, before the Secretary of the Navy had finally decided the cause of delay as aforesaid and before there had been a preliminary or conditional acceptance of the vessel, under article 10 of the contract as authorized by article 3 thereof, owing to the

failure of the defendants to furnish, in the order required, the material which they had agreed to furnish and the refusal of said Secretary to permit such trial thereunder, the contract was modified (which modification is made part of the petition herein and marked "Exhibit W. C. & S. No. 2"), by the terms of which modification the defendants agreed to pay the claimant a portion of the reservations of installments, which, under the original contract, were not payable, as therein set forth, until after a preliminary or conditional acceptance of the vessel. The amount of the reservations so earned by the claimant up to that time which had been withheld by the Government by reason of its delay aforesaid, amounting to $234,830, was paid, the claimant giving bond with security against any loss to the defendants on account of such payment, but no demand for any refund was ever made upon it. At the time and prior to the execution of the modification of said contract the claimant, partly by reason of the delays of the Government and its refusal as aforesaid and partly by reason of unprofitable contracts with other parties for merchant vessels, was embarrassed financially, and was unble to procure money elsewhere; and in consideration of the payment being made as aforesaid the claimant, as recited in said modification, released the defendants "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the defendants" to comply with said contract "or on account of any delay hitherto occasioned by them."

To the delays of the Government, the signing of the modification of the contract and the release as aforesaid, the claimant verbally objected.

Thereafter on February 1, 1896, under similar circumstances of financial embarrassment, as aforesaid, and in order to relieve the claimant financially from such embarrassment a further modification of the contract, as set forth in the petition as "Exhibit W. C. & S. No. 3," was entered into between the parties, the claimant, as before, executing a bond with security against any loss to the defendants, the payments, amounting to $150,000, being made, as therein stated, in consideration of a like release "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the defendants" to comply with said contract "or on account of any delay hitherto occasioned by them." No demand was ever made upon the claimant for any refund of the amount so paid it under said agreement.

To the delays of the Government, the signing of the modification of the contract, and the release as aforesaid, the claimant verbally objected.

VI.

On November 23, 1896, after the completion and delivery of the vessel in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the amount due thereunder, but withheld in accordance therewith until the final acceptance of the vessel, was paid to the claimant, and the same was accepted and a release approved by the Secretary of the Navy was entered into by it without any written protest, in the terms following:

"Whereas by the eleventh clause of the contract, dated November 18, 1890, by and between the William Cramp & Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a coast line battle ship of about 10,000 tons displacement, which for the purposes of said contract is designated and known as coast line battle ship No. 2, it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel has been finally tried, provided that such final trial shall take place within five months from and after the date of the preliminary acceptance of the vessel; and

"Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve, or so much thereof as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

41 "Whereas the final trial of said vessel was completed on the 24th day of October, 1896; and

"Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

"Now, therefore, in consideration of the premises, the sum of $57,536.60, being the balance of the aforesaid special reserve to which the party of the first part is entitled, being to me, in hand, paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, the William Cramp & Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself, and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

"In witness whereof I have hereunto set my hand and affixed the seal of the William Cramp & Sons Ship and Engine Building Company this 23d day of November, A. D. 1896.

"THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY.

"[SEAL.] CHAS. H. CRAMP, *President.*

"Attest:

"THEODORE W. CRAMP,

"Assistant Secretary."

VII.

At the time of the payment of said balance and the execution of the papers set forth in Finding VI the claim set out in the petition had been submitted to the Secretary of the Navy under the act of June 10, 1896 (29 Stat. L., 361, 374), for investigation and report on the claims of contractors for the construction of hulls and machinery of vessels for the United States subsequent to January 1, 1891, and was at that time under examination by him, which examination resulted on December 9, 1896, in a report by the Secretary to Congress in which the following language occurs:

"I have considered carefully the nature of these claims and the circumstances out of which they arose, and while not attempting to pass on the merits of the same or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that such delay was in some measure at least due to failure on the part of the Government to obtain and furnish the contractors the armor for the vessels as required, and in my judgment the interests of justice demand that they should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted to them by the committees of the two Houses of Congress." In said report the attention of Congress was called to the two memoranda of agreements and releases referred to in Finding V, and in relation to which he said: "It will be observed that the contractors
42 claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress." No reference was made in said report to the final release theretofore executed by the claimant company under the sixth clause of the nineteenth paragraph of the contract. (See House Ex. Doc. No. 69, 54th Cong., 2d sess., pp. 1, 2.)

VIII.

After the expiration of the contract period and during the two years six months and nine days that the vessel was delayed in completion, as hereinbefore found, the reasonable value of the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the Massachusetts was $3,000 per month, or $90,900 for the two years six months and nine days' delay.

The proportion of said expense chargeable to the Massachusetts from October 5, 1894, the date of the first release set forth in Finding V, being for one year seven months and twenty-four days, was $59,400, and from February 1, 1896, the date of the second release set forth in said Finding V, being for three months and twenty-nine days, was $11,900.

IX.

For the proper care and protection of the vessel during the two years six months and nine days' delay, including expenses of cleaning the bottom, furnishing material, and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and débris, the reasonable cost was $60,600.

The proportion of said expense for the period from October 5, 1894, the date of the first release set forth in Finding V, being for one year seven months and twenty-four days, was $39,600, and from February 1, 1896, the date of the second release set forth in said Finding V, being for three months and twenty-nine days, was $7,933.33.

X.

The customary rate of wharfage of merchant vessels at the port of Philadelphia during the time the Massachusetts was being constructed was 1 per cent net registered ton, and upon that basis, if allowed, the wharfage on the Massachusetts, with a net tonnage which we find was 3,203.58, during said two years six months and nine days' delay was $32 a day, or $29,408.

The proportion of expense during the period from October 5, 1894, the date of the first release set forth in Finding V, being for one year seven months and twenty-four days, was $19,168, inclusive of the dredging of the basin or bed in which to accommodate the vessel, and from February 1, 1896, the date of the second release set forth in said Finding V, being for three months and twenty-nine days, was $3,808.

The claimant also incurred an expense of $6,011 for tug service in removal of the vessel from time to time. Such expense
43 is not shown to have been necessary to the construction of the vessel during the period of delay. It appears to have been for the benefit and convenience of the claimant.

XI.

During the two years six months and nine days' delay the claimant was required to and did keep the vessel insured for the benefit and protection of the United States, and the reasonable cost thereof aggregated during said period the sum of $34,316.37.

The proportionate expense for the period from October 5, 1894, the date of the first release set forth in Finding V, being for one year seven months and twenty-four days, was $22,367.18, and from February 1, 1896, the date of the second release set forth in said Finding V, being for three months and twenty-nine days, was $4,443.56.

XII.

The items of cost and expense during the period of delay between the several releases in the findings are as follows:

Finding—	Item.	Two years six months nine days.	One year seven months twenty-four days.	Three months twenty-nine days.
VIII	Superintendence and upkeep of yard	$90,900.00	$59,400.00	$11,900.00
IX	Protection of vessel, cleaning, painting, etc	60,600 00	39,600 00	7,933 33
X	Wharfage on vessel	29,408 00	19,168 00	3,808 00
XI	Insurance on vessel	34.316 27	22,367.18	4,443.56
	Total	216,224.27	140,535.18	27,984.99

XIII.

The claimant company submits for the consideration of the court the evidence of the then Secretary of the Navy and the president of the claimant company, who signed the contract on behalf of their respective principals, along with certain other testimony, taken since the decision in the case of the Indiana, to prove that at the time of the signing of the contract as aforesaid it was not within the minds of the parties so signing said contract that the language of paragraph six of the nineteenth clause of said contract, to wit: "On the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract," should embrace claims for unliquidated damages of the character herein sued for, and that in so far as the language of said final release includes such unliquidated claims it was inserted by mistake, inadvertence, or accident, and did not express the true intent of the parties, and that the same should be so reformed as to exclude such claims.

The court, after due consideration of the evidence aforesaid as well as the evidence adduced on behalf of the defendants, finds that there was no mutual mistake between the parties in the execution of the contract or the releases thereunder; that the language of
44 said contract and releases expressed the intention and purpose of the United States as previously agreed upon, though the contracting party on behalf of the claimant company may have mistaken its legal rights thereunder.

XIV.

Upon the foregoing findings of fact the court finds the ultimate facts, so far as they are questions of fact, (1) that at the time of the execution of the releases set forth in finding V the claimant company was not, by reason of the acts or delays of the Government, under duress; and (2) that there was no mutual mistake between the parties in the execution of the contract or the final release thereunder, as the

same expressed the true intent and purpose of the United States, and the failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or their officers, and that therefore the same are not the subject of reformation.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, on the authority of the case of United States v. William Cramp, etc., Company (206 U. S., 118), that the claimant is not entitled to recover, and its petition is therefore dismissed.

5. *Opinion of the Court.*

PEELLE, Ch. J., delivered the opinion of the court:

The question now arises on the claimant's motion for a new trial and to amend findings on the ground of error of law as well as error of fact. We will therefore review the case.

The contract in this case for the construction of the battleship Massachusetts is identical with that between the same parties for the construction of the battleship Indiana, and the breaches complained of are in effect the same—that is, by reason of the delay of the Government in furnishing the armor plate in the order which, by the terms of the contract it agreed to do, the completion of the vessel was delayed for two years six months and nine days, which delay the Secretary of the Navy under the authority of the contract decided was due to the failure of the United States to furnish the materials in the order as aforesaid, and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the ninth clause of the contract was extended by the Secretary a corresponding length of time, to wit, to May 29, 1896, on which date the vessel so contracted for was completed and delivered.

The defense is that the extension of time so granted operated to release the Government from any damages which might have accrued by reason thereof, and, further, that the execution of the modifications of the contract and the releases thereunder, as well as the final release as set forth in Findings V and VI, operated to release the United States from all claims of any kind or description under or by virtue of the contract, including claims for unliquidated damages of the character described in the petition.

The contract and the releases in the case of the Indiana were considered by the Supreme Court (206 U. S., 118, 127), and
45 the judgment of this court was reversed (41 C. Cls., 164).

There the contention was as to the effect of the final release, in relation to which paragraph 6 of the nineteenth clause of the contract provided:

"6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part

of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said 'special reserve,' or the surplus, if any, of the said 'reserve fund,' or so much of either as it may be entitled to, on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

In construing that provision of the contract the Supreme Court, among other things, said:

"Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone 'claims under,' but 'claims by virtue' of the contract—'claims of any kind or description.' All the claims for which allowances were made in the judgment of the Court of Claims come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen. Now, it having been provided in advance that the contract should be closed by the execution of a release of this scope, it can not be that the company, when it signed the release, understood that some other or lesser release was contemplated. It must have understood that it was the release required by the contract—a release intended to be of all claims of any kind or description under or by virtue of the contract, and that the form of words which the secretary had approved was used to express that purpose."

And further, in commenting on the release, the court said:

"Indeed the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract. Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction. The general language 'all and all manner of debts,' etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest."

The holding is that the release contemplated by the contract was to embrace, as the court says, "all the claims for which allowances were made in the judgment of the Court of Claims," including claims of an unliquidated character, though the Secretary of the Navy was without authority to settle such claims.

Following that decision this court under a like contract between the same parties for the construction of the ironclad Alabama (43 C. Cls., 202, 218), held that when the conditions, covenants, etc., had been performed and final payment made the claimant was obligated to sign the release provided for by the terms of the contract releasing the Government from "all claims of any kind or description under or by virtue of said contract;" that the rights of the parties were determined by the contract itself and not
46 by the language of the release. On appeal, however, the case was reversed (216 U. S., 494) on the ground that

the proviso to the release in that case excluded claims arising under said contract, which the Secretary of the Navy had no authority to entertain, and in respect of which the court said:

"It results therefrom that a release executed in accordance with the terms of the contract would have extinguished all claims of the company against the United States growing out of the contract (206 U. S., 118); that the Secretary of the Navy had no power to pass upon and adjudicate claims for unliquidated damages; that he had power to accept a release such as was given, and that the proviso left for determination in the courts claims for unliquidated damages growing out of the contract."

From this it follows that in the present case the claimant must be denied a recovery for the unliquidated damages claimed because the final release it signed was in accordance with the terms of the contract, no reservation being made therein.

The claimant, however, contends that the facts in this case differ from those in the Indiana both in respect of the modifications of the contract and releases thereunder and the final release in this, that at the time of the execution of the modifications of said contract and releases thereunder the claimant was, by reason of its financial embarrassment caused by the delays of the Government as aforesaid, under duress. But as under the ruling of the Supreme Court in the case of the Indiana cited all claims for damages arising under or in pursuance of the contract were released to the Government by the terms of the final release, we need not consider the effect of the prior releases further than to say that testimony of the officers of the Government and of the claimant company having to do with the contract was taken and offered by the claimant company, after the decision in the case of the Indiana, to prove (1) that the execution of the modifications of said contract and the releases set forth in Finding V were without consideration because the company was at the time of the execution thereof, by reason of its financial embarrassment caused by the delays of the Government, under duress; (2) that at the time of the execution of the original contract it was not within the intent of the parties that the final release therein referred to should embrace claims for damages over which the Secretary of the Navy had no jurisdiction to settle, and the final release is asked to be reformed accordingly.

The claimant's contention is that the language of the sixth paragraph of the nineteenth clause of the contract was not intended to embrace unliquidated claims, and that, therefore, the language of the final release should be so reformed as to exclude them. This is a question of law, and was the view of this court in the case of the Indiana; and if the same should be held the correct view now the claimant company would probably be entitled to relief without the reformation of either the contract or the final release.

But, as the final release, as held in the case of the Indiana, is in conformity with the contract, its reformation would not avail the claimant without also reforming the contract; and as the evidence disclosed by the findings fails to show that there was any mutual mistake in the contract (nor is any averred in the petition), there

is no ground for reformation. The effect of the claimant's
47 contention is that under the contract the Secretary of the Navy might, as in the case of the Alabama, have prescribed two forms of receipt; and having prescribed but one, as in the case of the Indiana—though the claimant made no demand otherwise—the one he did prescribe in this case was not within the intent of the parties.

The question then is, do the matters on which the claimant company relies bring the case within the authorities which govern the reformation of contracts? That the claimant has not established by its propositions that there was a mistake in fact in the execution of either the contract or the intermediate contracts or the final release will be seen by a review of the authorities.

As held in the case of Citizens National Bank v. Judy (146 Ind., 322), "In every case it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon, and that the writing afterwards signed fails to be, as it was intended, an execution of such previous agreement, but, on the contrary, expresses a different contract." That holding is supported by the highest courts in many, if not most, of the States, as will be seen by examining the American & English Encyclopedia of Law, volume 15, page 651, note 5.

In the case of Hearne v. Marine Insurance Co. (20 Wall., 488, 490) the court went further and said: "The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court upon either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be grounds for rescinding, but not for reforming the contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

Later, in the case of United States v. Budd (144 U. S., 154, 161), the court quoting from the case of Maxwell Land Grant (121 U. S., 325, 381), said: "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt." The case of Hearne v. Marine Insurance Company, supra, was followed by this court in the South Boston Iron Works Case (34 C. Cls., 174, 201).

In the Milliken Imprinting Company Case (40 C. Cls., 81), where a circular had been issued by the Commissioner of Internal Revenue inviting bids for imprinting stamps, and under the belief that the terms recited in the circular had been set out in the contract the claimant signed the same, but afterwards discovered that certain material portions thereof had been omitted, this court held that there was such mutual mistake as to justify a reformation; but on appeal the case was reversed (202 U. S., 168) on the ground that

there was no mutual mistake justifying the reformation of the contract.

Therefore the mistake must not only be shown beyond a reasonable doubt, but it must be mutual, "unequivocal and convincing," and common to both parties; and in this respect the court, in the case of Diman v. Providence, W. & B. R. Co. (5 R. I., 130),
48 held: "if the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before, and the court would have been engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other." Hence it is uniformly held that a unilateral mistake is no ground for reformation in the absence of fraud or other inequitable conduct by the other contracting party; and even in such case, if fraud be shown, relief will be granted on that ground rather than for a mistake; nor can the contract be reformed on the ground of mistake arising from ignorance of the law (Hunt v. Rhodes et al., admrs., 1 Pet., 1, 14), unless the party seeking such reformation was misled as to his legal rights by the statements of the other party—not contended in the present case—(Snell v. Atlantic F. & M. Ins. Co., 98 U. S., 85), but a mere mistake of law without other circumstances constitutes no ground for the reformation of written contracts (Snell v. Atlantic F. & M. Ins. Co., supra), especially where such mistake is unconnected with any mistake of fact and there is no fraud or undue advantage entering into the agreement (Nabours v. Cocke, 24 Miss., 44, 51, and numerous other cases cited in support of the same proposition in the Am. & Eng. Ency. of Law, vol. 15, p. 635, note 1).

In the case of Hunt v. Rhodes et al., cited above, the Supreme Court, in speaking of the reformation of a contract on the ground of mistake arising from ignorance of the law, said: "The question, then, is, Ought the court to grant the relief which is asked for upon the ground of mistake arising from any ignorance of law? We hold the general rule to be that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only a few in number, but they will be found to have something peculiar in their character."

This case has been followed by the Supreme Court in many cases since, and the last case is that of Utermehle v. Norment (197 U. S., 40, 56), where, in speaking on this subject, the court said: "It has been held from the earliest days, in both the Federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake."

It may therefore be laid down as a well-established rule that where there is no mixed question of law and fact and no fraud, undue in-

fluence, or deceit, a court of equity will not grant relief. In the case of Lyon v. Richmond (2 John (N. Y.) Ch., 51, 60) Chancellor Kent said: "The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

It is manifest from the findings as well as from the evidence that there was no duress, nor was there mutual mistake between the parties either as to the facts or the law, as the language of the
49 contract and releases clearly express what was intended by the officers and agents of the United States; or, as was said by the court in the case of the Indiana, the "language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract."

But as the reformation of a contract is an equitable proceeding, and the Supreme Court reserves to itself the right, if deemed competent and material, to examine and review the evidence independent of the findings, we deem it unnecessary to review the evidence—in the main matter of opinion—or give the substance thereof. The sole ground for a reformation of the final release was the conception of the claimant company as to its legal rights under contract, i. e., that the claimant company was damaged by reason the co[illegible] of the Government in furnishing the armor plate in the of the delay upon; that the same was not satisfied by the correspondi order agreed of time, and that, therefore, the language of the final release was not intended to embrace claims arising from such delays.

Such was the view of this court in the case of the Indiana but on appeal the Supreme Court held that the final release was in conformity with the contract and reiterated the same in the case of the Alabama. It follows that to reform said release excluding claims of the character here involved it must be upon the theory that such claims were not embraced within the language of the sixth paragraph of the nineteenth clause of the contract. In view of the adjudications of the Supreme Court to the contrary we do not feel at liberty to so hold; nor do we feel at liberty to insert in the final release by construction language reserving to the claimant the right to be heard in court when it might, by protest and demand, have had the same inserted with the consent of the Secretary. So, in the final analysis the case resolves itself into this: Was the language of the final release authorized by the sixth paragraph, clause 19 of the contract? This is a question of construction and not of reformation, and is answered by the Supreme Court in the case of the Indiana; and as the Secretary, who had the power so to do, prescribed and accepted the final release, as well as the other releases in the case, we must hold that the terms of the contract as expressed in the release have been complied with.

The claimant's motion for a new trial is overruled. The motion to amend the findings is allowed in part and overruled in part. The former findings of fact and opinion are withdrawn, and new

findings and opinion are this day filed, the former judgment dismissing the petition to stand.

HOWRY, *Judge*, dissenting from the conclusions:

This is a proceeding under the equity powers of the court to reform a contract entered into between plaintiff and defendants for the construction of a battleship known as the Massachusetts; and to reform certain intermediate receipts, and especially to reform the terms of a final receipt given to defendants under an agreement for the construction of the vessel.

Immediately upon the signing of the contract plaintiff prepared the necessary drawings and templates according to the design of the agreement, but the Government decided to use nickel steel in the construction of the armor, thereby suspending their use, and delayed the manufacture of the armor. New sets of both had to be prepared and plaintiff supplied the second set within the time required by the contract. Plaintiff proceeded to that stage when the diagonal armor plates were necessary to go further with the work. Some of this armor belt was furnished about a year thereafter, but delivery was not completed until 14 months after the armor plates were called for by the contractor. The delivery of other armor was unreasonably delayed and more than a year consumed in harveyizing the plates after they had been finished (according to the original plan), growing out of the election of the Government to substitute the harveyized plates for the original plates. Other necessary material was not furnished on contract time, causing a delay of two and a half years. By reason of the several delays and defaults on the part of the Government, plaintiff was put to extra cost and expense and subjected to heavy loss and damage by the interruption to its work, thereby making it necessary for the contractor to provide special arrangements in shops for tools and appliances; preparing an extra dock and keeping the same in repair for two years; and for the care and maintenance of the vessel, including coal, wages, covers, extra painting, tug hire, and other like expenditures during the period of delay. Plaintiff was likewise compelled by the Government's delinquencies to keep the vessel insured and to pay additional premiums therefor, and to borrow money to carry on the work and to pay interest therefor by reason of being deprived of the payments that would have otherwise accrued to it, and which would have rendered the payment of interest on the money borrowed by it unnecessary.

The court is in full accord as to the amount of these items of cost and expenses during the period of delay, and eliminating all claim for interest and every doubtful item, the court finds that the actual cost of the care and maintenance of the vessel was $216,000, according to the schedule appearing elsewhere. When the vessel was structurally ready for the trial trip to which, under article III of the contract, it was entitled without armor (the Government having failed to furnish it), the claimants advised the United States and were prepared to do the necessary temporary work to make it seaworthy for such trial, and upon such trial the claimant company was

entitled immediately to a payment of earned money aggregating over $700,000.

The Secretary of the Navy, while admitting and confessing that the delays in the completion of the vessel had been brought about by the default of the United States, refused to permit a trial trip to be made without armor, notwithstanding the provisions of article III, deeming it to the best interests of the United States to make no trial until the vessel was entirely completed and declined to pay any of the moneys conceded to be earned under the contract unless petitioner would agree to release its claims against the Government on account of its losses and damages. The record shows that at the date of these intermediate receipts, aside from the $730,000 earned on the Massachusetts and withheld because she had had no trial trip, there was due from the United States on other vessels and withheld, on the 10th day of October, 1894, the date of the first receipt, $1,614,013.95, and on the date of the second receipt, February 8, 1896, $452,326.12. The contractor thereupon executed to the Secretary certain receipts,

but avers a want of consideration and complains that these
51 intermediate receipts were given under stress of the action of the Secretary in refusing payment for moneys actually earned under the work of construction unless the contractor would include in the intermediate receipts language exonerating and acquitting the Government of the amount of the losses inflicted by the nondelivery of the armor.

There is no dispute as to the fact of the Government's delay and the consequences of that delay to plaintiff, nor is there any dispute that the Secretary of the Navy took the intermediate receipts in the belief that the contractor had a remedy either before Congress or in the Court of Claims for its losses growing out of the Government's delinquencies. But Mr. Cramp was apprehensive at the time the receipts were exacted of and signed by him, and protested vigorously.

At that time, it will be seen hereafter, the Cramps were in considerable financial trouble. They had to pay several thousands of employees to carry on the company's shipbuilding work and maintain their plant. Under all these circumstances the contractor was obliged to respond to the arbitrary demand of the Secretary according to the department formula in paying for ship construction or abandon its business. As these facts are neither disputed nor denied, and as the intermediate receipts were exacted under an erroneous construction of law, plaintiff insists that the department should not take advantage of its own wrong, not only because of the surrounding circumstances, but also because of the duress and coercion exercised in the matter of these receipts. When the vessel was completed a receipt or final release under the contract was exacted in the manner following the usual departmental form under the contract provision requiring a release. The claimant company insisted that neither the contract provision nor the final release demanded under it was intended by either of the parties thereto to cover damages accruing to the company by reason of the default of the Government. Thereupon, the company invoked the equity powers of the court to reform both the contract provision and the receipt, should the language be

capable of such construction, and supplemented this effort for reformation by calling the officials of the department charged with the making and carrying out of the contract including ex-Secretary Tracy and ex-Secretary Herbert, who fully corroborated the company's contention.

The reform of the final receipt prayed for was denied May 16, 1910 (the writer not being present and taking no part in the decision), in an opinion filed by Peelle, C. J., for the following reasons, viz:

(1) That evidence was not admissible to vary the terms of the contract.

(2) Because the final release was not such a mistake, inadvertence, or accident as the court could relieve, though the claimant company might have mistaken its legal effect.

(3) Because, regardless of the intent of the parties, this court could not give a different construction or interpretation to the language used, as the same language had been considered and passed upon between the same parties in another case, 206 U. S., 118.

Subsequently the cause was remanded for argument upon the following propositions:

(1) Is the contract or the final release thereunder the subject of reformation when the plaintiff could by diligence have protected itself against the mistake which it complains of by securing a
52 provision in the release reserving for determination by the court the validity of the claims it now asserts, as was done in the case of the Alabama, 216 U. S., 494?

(2) If said contract or the final release be the subject of reformation, is the evidence adduced competent and sufficient therefor?

Both parties had liberty to take further testimony, which seems to have been a concession by the court that parol testimony was admissible.

I am unable to see how a doubt could ever have existed as to the right to reform upon proper evidence. Courts of equity would have but little to do in reforming agreements except for the use of parol testimony outside of the written contract and unless mutual mistakes appear from extrinsic proof in reducing to writing the intention of the parties. Evidence of fraud or mistake is seldom found in the instrument itself.

Parol evidence, as said by Lord Hardwicke, in Baker v. Paine, 1 Ves., 456, is not read to contradict the face of the instrument but to prove a mistake.

The Supreme Court of the United States said, in Walden v. Skinner, 101 U. S., 507, that "Courts of equity afford relief in case of mistake of facts and allow parol evidence to vary and reform written contracts and instruments when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, if it be fully proved by other evidence."

"The jurisdiction in equity to decree the correction of errors which have been caused by mutual mistake is firmly established and needs

no citation of authority to sustain it." Zartman v. First National Bank, 216 U. S., 134.

There is a class of written agreements where parol testimony is inadmissible to interpret them. These, for instance, are policies of insurance, which of themselves furnish the only way by which their terms can be waived or changed. The case now before the court is unlike the last class.

Although this court can not exercise some of the peculiar powers of a court of equity, as, for instance, to decree specific performance, it has the equitable power to determine the money relief to which claimants may be entitled whether arising out of an equitable or legal demand. United States v. Jones, 131 U. S., 18. The jurisdiction to reform under the act of March 3, 1887, 24 Stat., 505, was so well defined in South Boston Iron Works v. United States, 34 C. Cls. R., 174, the Supreme Court in District of Columbia v. Barnes, 197 U. S., 152, approved the opinion of this court stating this principle and giving the relief prayed for in the Barnes case. Mr Justice Day, in that case, said that one having the right to money relief upon a contract mistakenly omitted to be reduced to writing in accordance with the true agreement of the parties has a claim for equitable cognizance so that the contract should be reformed to meet the intention of the parties and, as corrected, to be adjudged a valid claim.

In United States v. Milliken Imprinting Co., 202 U. S., 173, on appeal from this court, Mr. Justice Holmes said in referring to the right of this court to take equity jurisdiction under the first
53 section of the act of March 3, 1887, to reform a contract, that the Court of Claims was warranted in taking such jurisdiction. Though the mutual mistake was not made out in the Imprinting case on the facts there presented, jurisdiction was distinctly recognized, which of necessity carries up the record in the present case for the appellate court to determine from all the proof the final decision.

The Court of Claims is not bound by special rules of pleading, the main purpose being to arrive at and adjudicate the justice of claims against the United States. The forms of pleading are not of so strict a character as to require omissions to be held fatal to the rendition of such judgment as the facts demand. United States v. Burns, 12 Wall. 254; United States v. Behan, 110 Ib., 339; Clark v. United States, 95 Ib., 543; United States v. Carr, 132 Ib., 630; Wisconsin Central v. United States, 164 Ib., 190.

It has appeared that at the outset the majority excluded as incompetent and inadmissible all evidence tending to explain the intent of the parties and the true character of the instrument because the final receipt given could not be varied by parol testimony and because of the decision of the appellate court as to the effect of the naked release. The ground taken in refusing evidence for the purposes indicated and with respect to the matter of mutual mistake being no ground for reformation (practically brought forward in the present opinion of my brethren of this bench) seems so fundamentally erroneous, reasons are now presented from the highest authority to show to the contrary. No court has gone further than the Supreme Court of the United States (except the highest court in Mississippi) in overthrowing all three propositions of the majority of the court.

Chief Justice Chase in an opinion (which alone will carry him into history as a just judge and as worthy of his great office) said for the court over which he presided that evidence could be received to prove that a promise expressed to be for the payment of "dollars" without qualifying words was in fact made for the payment of something other than lawful dollars of the United States. The contract was for the payment of Confederate States' treasury notes given for the sale of property in the usual course of business. Confederate notes had never been made a legal tender and because of that fact it was contended that no evidence could be received to show any other meaning of the word when used in a contract. They had become current as dollars by irresistible force. But the court held that no rule of evidence properly understood required a refusal to admit proof of the sense in which the word dollar was used in the contract. Evidence was held admissible in order that justice be done. Thorington v. Smith, 8 Wall., 12.

Equity afforded relief where no mistake appeared as to the facts but where there was a mistaken opinion on the part of a public officer in Mullan v. United States, 118 U. S., 271. There, the Secretary of the Interior had approved lists of public land under which selections were made and titles had passed. It was held that these selections could be vacated and titles under them annulled in a suit in equity brought directly for that purpose. The court found that the mistake, although one of law, could be corrected and relief was accordingly given in a court of equity for the benefit of the United States.

54 In Patch v. White, 117 U. S., 210, an error in a will was rectified not alone by the context of the will but by parol evidence. There it appeared that a testator had devised certain lots to each of his near relations, and to his brother a lot described as No. 6 in square 403. He then devised to his infant son the balance of his real estate to consist of certain lots, describing a number of them, but not describing lot No. 3 in square 406. It was held by the court that the testator intended to dispose of all his real estate, and thought he had done so, and that in the devise to his brother he believed he was giving him one of his own lots. On this state of affairs the court held that parol evidence might properly be received to show that the testator did not and never did own lot 6 in square 403, but he owned lot 3 in square 406. This raised a latent ambiguity which the parol evidence, taken in connection with the context of the will, was held sufficient to show that there was an error in the description.

In Hall v. Lafayette Co., 69 Miss., 539, it was held that an agreement should not fail of execution by reason of ignorance, whether of fact or of law, in expressing intention in the instrument used. There it appeared to have been the intention of all concerned to make a bond covering all kinds of funds, but the parties made a bond covering only county funds. The law required a special bond for school funds and the default was of school funds. It was held that while equity could not make contracts for parties and where parties, through erroneous views of law, reject one sort of contract and make another (led thereto by a mistaken opinion as to the law, as in Hunt v. Rousmanier, 1 Pet., 1), equity would not relieve.

But where parties contract for a particular result, and intend to effect it and fail to accomplish it, even through ignorance or mistake of law, equity will effectuate the intent. If in putting the agreement into form it fails to express and stipulate for that which the parties understood and intended a case is made for a court of chancery.

In Hunt v. Rousmanier, supra, the early English principle was enunciated that equity had no power to make agreements for parties and then compel them to execute the same. Relief was denied because one party gave and another party received a power of attorney authorizing the creditor to sell certain property of the debtor and apply the proceeds of sale to the payment of the debt; but the power having become annulled by the death of the debtor equity could not direct a new security to be given or a lien to be fixed on the property as security for the debt even though the parties acted in ignorance of the rule of law which made the death of the constituent a revocation of the power.

In Hall's case, supra, the whole contract was for funds not taken. The court was asked to enlarge the terms of the bond, so as to include liability for something beyond its promise. The general bond of the defaulting officer was not security for school funds. Nevertheless, the instrument was reformed so as to express the implied thought which the court thought the makers had when they signed the bond. Campbell, Ch. J., who delivered the opinion of the court, was doubtless right in his general statement of the principle, but authority is not wanting against the correctness of the view taken by the court that a penal obligation could be reformed. A penal bond has not generally been considered subject to extension or subject to be enlarged by the act of others, even if the oral agreement be express, much less upon implication, as the bond was reformed on what the court thought was an implied agreement. The Hall case is an extreme one and is cited to show how far respectable courts have gone in the effort to reform written agreements and do substantial justice.

In Gillespie v. Moon, 2 Johns' Ch., 585, Chancellor Kent said that he had looked into most if not all of the cases and that it appeared to be established that relief could be had against any deed or contract in writing founded in mistake or fraud.

In Snell v. Insurance Co., 98 U. S., 89, the great commentator's opinion was quoted as the settled law of the Supreme Court, and stated that the court was careful in Hunt v. Rousmanier to say that it was not its intention "to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law."

Rules which govern the exercise of the power to reform "are founded in good sense." Hearne v. Marine Ins. Co., 20 Wall., 490. This terse statement of the Supreme Court was supplemented by the statement that the mistake must be common to both parties to the instrument. The evidence is clear here that the contract when executed did not contemplate anything except the contract price agreed upon for the construction of the ship. The contract was not executed to be discharged by the arbitrary action of any officer of

the Government for breaches of the contract causing losses to the contractor beyond the price agreed upon. Ex-Secretary Tracy declares in his testimony that when the contract was made he did not understand that the contractor was to be called upon, as a condition of its receiving the contract price payable for the construction of the ship, to release the Government for the breach. Had this Secretary been called upon to frame the release, he says he would have excluded the present claim from its operation because of the reservation to himself to frame the releases. Corroborative of his understanding and intent, the Secretary testifies that in the case of the Union Iron Works he promptly agreed to pay it monthly the expenses the contractor was put to by reason of delays causing losses. See supplemental contract, p. 12. According to the testimony not only of ex-Secretary Tracy (who further says that he would have cheerfully written the same provision into the Cramp contract) Mr. Nagel testifies that the department was ready to do the same thing for the Cramp Company. Ex-Secretary Chandler testifies that he would not have required any release of claims for losses, under the contract, if such losses had been brought about by the default of the Government and the contractor had persisted in his claim in the proper way. What else was more proper than to have accepted in good faith the assurance of Secretary Herbert that relief would be afforded (with the cooperation of the head of the department taking the release) and with the further assurance that the claim for losses remained open for judicial or legislative relief?

Ex-Secretary Tracy's understanding and intent is further corroborated by his incorporating into the third article of the Cramp contract a provision by which he put upon the United States the expense incident to the care and preservation of the Massachusetts arising out of any delays for defaults on the part of the Government: (1) By covenanting to deliver the armor "within the time and within the order to carry on the work properly;" and (2) that in the event of Government failure so to do, to accept the
56 vessel without armor. So there is no merit in the contention that Secretary Tracy intended by clause 6 of article 19 to demand a waiver of damages or to compel a release of claims for losses upon the penalty of compelling the contractor to forfeit its claims for nondelivery of the armor on time. Article 3 is explicit with respect to the commencement of the delivery of the armor, and must not be construed to mean that the beginning of delivery was met by sending a single piece of armor of any description because the contract says, "Armor for her side belt, casemates, turrets, redoubts, barbettes, and conning tower." The intent and purpose of article 3 was the prevention of costs and damages to the Cramps. According to the distinguished head of the Navy Department who made the contract and the evidence of the assistant naval constructor—Lewis Nixon, of world-wide fame—who designed the Massachusetts in competition with experienced experts and naval architects, the contract would have accomplished that purpose had the Government lived up to its agreement.

Admiral Hichborn was charged with the preparation of the speci-

fications for building the vessel and with the details for its construction. He is positive that the proviso was inserted to protect the contractor against loss for any delay. At the time the Government had never before purchased armor. It had no experience and the making of armor was in the experimental stage. The armor makers had so little experience and the naval architects and experts being without any experience at all, the time of delivery and the quality of the armor became subjects of consideration as to whether armor could be delivered on time or in the order required. The head of the shipbuilding company, according to Admiral Hichborn, expressed great doubt to that officer whether the Government would be able to get the armor, stating to the admiral his apprehensions of delay whilst the Government was holding him up to penalties and the contracting company was getting no corresponding security.

The proviso to the contract came about as the result of a discussion between the Judge Advocate, the Secretary of the Navy, the chief constructor, and the men who were to bid on the contract, and the object was to protect the shipbuilders against loss in case the Government failed to carry out its part of the contract.

Secretary Herbert knew this. As early as March, 1896, vigorous protests against relinquishment of claims for loss and damage inflicted upon the contractor were made to Secretary Herbert.

The Secretary admits this. He had assumed office in March, 1893. That was after the harveyized nickeled steel armor had been unofficially decided upon but before the decision had been officially promulgated.

Negotiations for the manufacture of the armor got under way before the contract period had expired. The contractors objected because of the lateness of the change and because of the necessity arising to subject the armor to the new process. They said it would delay the completion of the work and entail loss and damage. Ex. Doc. 69; letter Aug. 22, 1893, p. 89. The Secretary of the Navy became possessed of exact knowledge that if the armor should be harveyized in the interest of the United States claims would arise for loss and damage.

The Secretary knew that by the application of the Harvey process "it would delay completion of the vessel for a long period
57 of time." He did not think that the delays would be as great as they subsequently proved to be. After the process was applied it was found difficult, "almost impossible, if not quite," to drill holes in the armor with the tools then in hand because of the hardness of the plate and its resistive power. A new process had to be invented annealing plates at points where they were to be perforated. Secretary Herbert says he recognized that the delays "would increase the cost because of the care, docking, increased insurance," and other expenditures resulting in claims against the Government for a breach of the contract. But the Secretary adds that he thought the contractor would be remitted either to a court or to Congress, and supports his statement from independent memory as well as by a reexamination of the correspondence. The Secretary is emphatic in the statement that it was not for him to

determine the losses and damages of the Cramps after he had decided that the Navy Department had no jurisdiction. Hence the official action with reference to the settlements as the work progressed, and the delays were meantime prolonged. Concurrently with the damages imposed upon the contractor, Cramp & Co. presented claims for their losses. H. R. Doc. 69, 2d sess. 54th Cong. This shows that both the Secretary and the Cramps were passing receipts which did not in fact include the claims then being presented for relief elsewhere.

When the final receipt was taken Mr. Herbert states positively that he had no intention to include any part of the claim for losses and damage. He acted in accordance with the uniform precedent that his department had no jurisdiction to pass upon this class of claims. In his letter to Congress relating to all the claims of Cramp & Co.—which included the claim of the Massachusetts—the Secretary said that "the interests of justice demand that they (the claims) should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted by the committees of the two Houses of Congress." At the very time this final release was signed under which the balance of the contract price, $57,536.60, was paid, November 23, 1896, there was pending before him under the act of June 10, 1896, the present claim, aggregating $483,757.49 as presented, and within 17 days thereafter he made the report to Congress, above referred to, never suggesting that he had taken 17 days before an absolute relinquishment of the entire claim, although he does specifically call attention to the two partial releases, coupling it with the statement that it was claimed that they were procured by coercion and duress.

After the release the Secretary proceeded to investigate and examine the claims submitted under the act of June 10, 1896.

The senior Cramp corroborates Secretary Herbert, and from the two statements it appears that the same intent was in the mind of Secretary Herbert in taking the receipt as controlled Secretary Tracy in making the contract.

According to Mr. Cramp, Secretary Herbert never intimated that under the contract the contractor was obliged to submit to the increased expense in the care and maintenance of the vessel (Rec. 67) arising out of the breach. There was no understanding, agreement, or suggestion either on the part of the Secretary of the Navy or the contracting company that the final receipt given in November covered in any manner claims for losses submitted September 30, 1896.

58 Under that rule of construction, that circumstances surrounding the execution of written instruments affect the subjects to which the circumstances relate and which may properly be resorted to for aid in determining the meaning of the words employed, the case seems complete as to the meaning of the final receipt.

So that, whatever view may be taken of the effect of the intermediate receipts pending the construction of the ironclad, there is nothing left to doubt as to the matter of mutual mistake with ref-

erence to the meaning and effect of the final receipt in all good conscience and law, if human testimony be the subject of belief.

It seems that Secretary Herbert was considering reference for settlement of losses sustained by the Cramps for the Government's breach of the contract to the Court of Claims when the final receipt was taken. That is the unmistakable evidence.

It must be understood that when final payment was due under the contract the Secretary of the Navy did not claim to have jurisdiction to settle the company's demands for its losses growing out of the failure of the Government to deliver armor for the ironclad. The Secretary had refused to make advances because he did not feel that he had the right, as an executive officer, to modify the original agreement without a new consideration. Consequently the Secretary refused to make partial payments unless the contracting company would give him a bond not only for the refunding, if necessary, of all advances then made but would accompany this bond with a release of all claims for damages that might have accrued before that time on account of the company's claim that the Government had delayed the builders in the completion of the work. Mr. Cramp insisted that the Secretary "should not take advantage of his circumstances in that way." That was in 1894. The company was financially embarrassed at that time. It appears that it was in need of funds and a working capital to carry on its business. Its indebtedness was steadily increasing, and the stringency of the money market was most pronounced during the year that the payments on the contracts were due. The fact, even if it was a fact, that the company had on its hands unprofitable contracts upon merchant ships and ships built for other Governments than that of the United States, aggregating very heavy sums, is not a circumstance to be considered as diminishing the fact of the company's financial embarrassments, but rather a fact to more than prove the straitened circumstances which in the year 1894 confronted the Cramps, but unfortunately the testimony of the witness which the Government relies on gives the list of vessels on which, according to his memory, the Cramps lost money, which on comparison with his testimony given in the case of the Maine, No. 26,398 (which was read without objection at the hearing), shows that not one of the vessels mentioned was in the yard in 1894, nor for more than four years after, the first arriving in 1897 and the last in 1901.

Though defendants allege that dividends were paid on the capital stock outstanding from October, 1894, to February, 1896, these dividends had not been earned. If dividends had not been paid, the contractor's credit would, perhaps, have been wholly impaired with banks. It is certain that the company was in distress and was experiencing much difficulty in extending its loans. Money to carry on the business was badly needed, and this fact was brought to the attention of the Secretary of the Navy at the time the payments were made to it and at a time when the Secretary was
59 refusing to pay anything unless the company would release its claims for damages. The record is full of testimony that the Cramps were heavy borrowers of money. It is historical

that there was a scarcity of money in the country at the time. The financial condition of the Cramps was such at the time that it was impossible for the company to raise money except on its contract for the building of this particular ship and two sister ships. The effort to show that the financial embarrassments of the Cramps were due to unprofitable contracts outside of the building by the company of ironclads for the Government does not change the well-established fact that at the time these intermediate receipts were given the company was on the verge of bankruptcy. In this state of affairs, and after much discussion and the continual insistence upon the part of Mr. Cramp that the refusal to pay the money without conditions was equivalent to a "hold-up on the plains," the receipts were signed as demanded by the Secretary.

Secretary Herbert's view that he must obtain a consideration for the change of contract stipulation as to partial payments is distinctly shown by the decision of the Supreme Court in the case of the Alabama to have been erroneous because the appellate court commended Secretary Long for the alteration of the terms of the contract and distinctly affirmed his right and power to change it.

Add to the foregoing conditions the fact that the Secretary of the Navy had the arbitrary power in case progress on the part of the contractor was unsatisfactory to him to declare the contract forfeited it will be readily seen that the Cramps were in the power of the official acting so unjustly. The contractor was completely at the mercy of the official. The Secretary of the Navy and the president of the contracting company did not stand on equal terms against an ultimatum which required the company to subject itself to a forfeiture of its contract or to execute a receipt surrendering its rights.

The proof is clear and positive that the Secretary had knowledge of the fact that the Cramps could not carry on their business unless they could get money, and that the money had been earned, and at the time the intermediate receipts were given the Cramps could not obtain the cash anywhere else.

The acceptance of a less amount of money by reason of financial embarrassment was coercion where the party paying was apprised of the situation and had himself done something that caused the embarrassment. Wheeler v. Smith, 9 How., 55; United States v. Huckabee, 16 Wall., 414; Swift v. United States, 111 U. S., 32 and cases cited; Robertson v. Frank, 132 Ib., 23; R. R. Co. v. Conn., 98 U. S., 543; United States v. Lee, 101 Ib., 196.

Early decisions respecting duress required the employment of physical force or threats of violence that would frighten and intimidate the most courageous. The cases cited substantially follow the later doctrine which Judge Cooley so well declares in Hackley v. Headley, 45 Mich., 469, when he said that "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform an act under circumstances which deprive him of the exercise of free will."

The present case for damages relates to the Massachusetts. It is a wholly different case from that of the Indiana, 206 U. S., 126. The latter case was an action at law, and the appellate court was unaided

by any extraneous evidence as to the technical meaning of
60 the word "construction" as used in the contract, and assumed the intent of the parties in the matter of the releases from the erroneous belief that the claim had not been presented until about a year and a quarter after the execution of the final receipt. Said the Supreme Court: "As bearing upon this matter it may be noticed that while the release was signed and the contract between the building company and the Government closed on May 18, 1896, this action was not brought until August 10, 1897, nearly a year and a quarter thereafter." It was not the appellate court's fault that the matter of further claim was deemed an afterthought, because it was further said by the court—dealing with supposed claims of more than a half million of dollars—that by the execution of the receipt the parties "surely never intended to leave such a bulk of unsettled matters." The case of the Indiana turned "on the release." If the court had been made aware that the claim was not an afterthought; that it was asserted at the very beginning; that it had been refused cognizance by the Secretary of the Navy for want of jurisdiction; that Congress had directed an examination of the claim, and that it was pending before the Secretary of the Navy at the very time the release was signed and favorably reported by the head of the Navy Department to Congress within a few days thereafter, it is reasonably certain the court could not have reached the conclusion it did. The inferences of the court clearly appear to have been based not only on the evidence not now presented, but on the erroneous assumption that the Cramp claims were without merit, gotten up for the special purpose of defrauding the Government.

I take my full share of the responsibility for the decision of this court in the matter of the construction of the Indiana. The release was thought by this court not to extend to any matter which was not the subject of negotiations between the contractor and the Secretary of the Navy. In this respect I thought with my associates that the execution of a receipt releasing the claims which the Secretary of the Navy had no jurisdiction to settle was not like the release of an amount due by judgment. Section 1092 Revised Statutes provides that the payment of the amount due by any judgment of the Court of Claims shall be a full discharge to the United States of all claim and demand touching any of the matters "involved" in the controversy.

In the case of the Alabama, 216 U. S., 494, the appellate court sustained the judgment of the Secretary of the Navy in refusing to settle claims for unliquidated damages on the ground that as an executive officer he was without authority to settle for them. Under a proviso to a release which did include claims arising under a contract under the terms of which the Secretary of the Navy did not have jurisdiction to entertain, the contractor was held not to be barred from prosecuting his demands for unliquidated damages before the Court of Claims. The case of the Alabama was reversed because this court did not follow two decisions of its own in order to give effect to the proviso. (This writer did not hear the case of the Alabama and took no part in its decision.)

An examination of the case of the Alabama, likewise of the

Indiana, discloses that there was no proof in this court or the higher court of what the parties intended except what the face of the written agreements disclosed. There was no effort to reform according to the intention. There was no attempt to explain the use and meaning in the receipt given for "the construction" of the ship. Both cases involved claims for unliquidated damages. Plaintiff by the language used and the failure to present extraneous proof had mis-
61 takenly restricted the court to the literal terms of the releases.

The meaning of both decisions, in the last analysis, determines that although claims for unliquidated damages required for their settlement the application of the qualities of judgment and discretion, executive officers were without jurisdiction to settle such claims. But yet, a receipt waiving such damages by a claimant was good and there was power in an executive officer to change the terms of the release if such damages by the stereotyped departmental form of release in the work of construction were agreed to be released by written instrument entered into between the parties.

There is no estoppel. When the intermediate receipts were exacted and taken upon conditions like those at bar, there can be no estoppel. The grounds of estoppel against plaintiff here are not nearly so strong as against defendants, and in this respect the case is not unlike that of Sturm v. Boker, 150 U. S., 337. A party is not estopped from asserting his claim unless his conduct has either damaged the Government or caused it to change its position by the acquiescence, silence, or other conduct of the claimant. Alford v. United States, 95 U. S., 356. Estoppel operates to prevent the truth from being heard where a claimant by his conduct has made it unconscionable for him to assert it. In this matter nothing was done to the detriment of the Government. Estoppels must always be reciprocal. Herman, sec. 328, 8 Wend, 480.

Nor is there any question of diligence or of laches. Where a party seeking relief has unreasonably delayed application for redress or where the circumstances raise the presumption that he acquiesces in the written agreement, equity may decline to grant relief. Graves v. Boston Marine Ins. Co., 2 Cranch, 419. With knowledge by the Government that a claim was pending for all the damages and losses when the final receipt was given, that it was a matter understood and acted upon by both parties to the final receipt at the time it was signed, and that the claims were under investigation as separate demands and were to remain open to settlement in the proper forum, there is eliminated any question of diligence.

There is nothing in any action heretofore taken on cases at law asking reimbursement for losses which prevents the court from reforming the contract and the receipts given thereunder. In a proceeding in equity to reform a general bond to include all kinds of funds a judgment at law can not be pleaded as res judicata. Hall v. Lafayette County, 69 Miss., supra. There is nothing to preclude the court from now reforming the writings of the parties according to the intent.

But as this is an equity case to reform written instruments this court can not prevent a review of all the facts by limiting its findings to matters within the discretion of the trial tribunal. The rules

touching the effect of the findings do not apply from the adjudication of this court on a claim which requires it to exercise equity jurisdiction to do justice. Harvey v. United States, 105 U. S., 671; United States v. Old Settlers, 148 U. S., 464.

As there is some question as to the sufficiency and extent of the duress and coercion when the intermediate receipts were given I will not say that plaintiff company is entitled to have relief against the settlement covered by these intermediate receipts although the Cramps were put to the alternative of sustaining loss under their contract by the withholding on the part of the Secretary of the Navy of moneys partly due under the contract unless the Cramps would execute these intermediate receipts.

But as to the final receipt and the amount then paid the right of the plaintiff company to relief seems to me to be entirely clear. On this last proposition I am willing to stand because the evidence fully justifies the conclusion. The appellate court cannot be restricted by the findings here because the case is one of equitable procedure.

62 While it is the duty of the courts to protect the Treasury against unjust demands, it is equally obligatory upon the judiciary when the truth is ascertained to give it effect to prevent wrong to individuals who deal with the United States. Our Government should not build battleships and be permitted to escape the consequences of its delinquencies. While this observation might well go without saying, it is said, because this writer does not believe that anyone would more readily afford relief on the whole record as it is now presented than the late Mr. Justice Brewer, who wrote the opinions in the case growing out of the contract for the construction of the Indiana as well as for the construction of the Alabama.

63 6. *Judgment of the Court.*

No. 20861.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington, on the 29th day of May, A. D. 1911, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimants be and the same is hereby dismissed.

BY THE COURT.

64 7. *Application for, and Allowance of, Appeal.*

From the judgment rendered in the above-entitled cause on the 29th day of May, 1911, in favor of the defendants, the claimants,

by their attorney on the 27th day of July 1911, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JNO. C. FAY,
Attorney for Claimants.

Filed July 27, 1911.

Ordered: That the above appeal be allowed as prayed for. January 6, 1914.

BY THE COURT.

65 In the Court of Claims.

No. 20861.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the foregoing are true transcripts of pleadings in said cause; of the findings of fact as finally allowed by the Court and the conclusion of law; of the opinion of the Court and of the dissenting opinion; of the judgment of the Court dismissing the petition; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I hereunto set my hand and the seal of the Court this 6th day of January, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

66 *a. Defendant's Motion to Dismiss.*

Filed June 19, 1907.

No. 20861.

(The "Massachusetts.")

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

Motion to Dismiss.

Comes now the United States, by its Attorney-General, and moves the Court to dismiss the petition of the claimant herein, for the

reason that the case at bar is founded upon a contract identical in its nature with that in the case of the above mentioned company against the United States, No. 20,858, decided by the Supreme Court of the United States May 13, 1907, on appeal from this Honorable Court, adversely to the claimant herein.

It further appears that the release which was given by the claimant company in the cause at bar is identical in terms with the release which was given by the claimant company to the United States in the case referred to, and on which the decision of the highest court rested. A certified copy of this release is on file with the papers in this case, and for the convenience of the Court herein a copy of the same is herewith attached, and the Court is asked, in the event that it grants this motion, to incorporate a copy of this release in its order of dismissal.

Furthermore the claimant company failed to protect itself at the time said release was given by protest or otherwise.

J. A. VAN ORSDEL,
Assistant Attorney-General.

FRANKLIN W. COLLINS,
Special Attorney.

67 *b. Memorandum, etc., of the First Trial of Case.*

On March 24, 1910, the defendant's motion to dismiss, and the merits of the case, were argued and submitted to the Court. On May 16, 1910, the Court filed findings of fact and conclusion of law, and entered judgment dismissing the petition.

68 *c. Claimant's Motion for New Trial and to Amend Findings.*

Filed May 20, 1910.

Now comes the claimant and moves the Court for a re-hearing and new trial in the above entitled case and assigns his reasons therefore that the Court erred in refusing to admit and consider the testimony offered by the claimant to reform the 6th clause of the 19th article of said contract and the final receipt so as to make it conform to the intent of the parties.

The Court erred in not including in the findings of fact all of the evidence offered by the parties upon the subject of the reformation of the contract and final receipt. For that the question of fact in equity proceeding is reviewable by the Supreme Court and the evidence should be embraced in the findings.

The Court omitted, in its 5th finding, any statement as to the refusal of the Secretary of the Navy to permit trial trip under the 3rd article of the contract to which said vessel was entitled and the claimant asks the Court to amend said finding so as to read as follows:

On October 5, 1894, before the Secretary of the Navy had finally decided the cause of delay as aforesaid and before there had been a preliminary or conditional acceptance of the vessel owing to the

failure of the defendants to furnish in the order required the material which they had agreed to furnish [and the refusal of the Secretary of the Navy to permit a trial trip under the provisions of the third article of the contract, although said vessel was entitled to make said trial trip under the provisions of said article] the contract was modified (which modification is made part of the petition herein and marked "Exhibit W. C. & S. No. 2") by the terms of which modification the defendants agreed to pay the claimant a portion of the reservations of installments, which, under the original contract, were not payable, as therein set forth, until after a preliminary or conditional acceptance of the vessel. The amount of the reservations so earned by the claimant up to
69 that time which had been withheld by the Government by reason of its delay aforesaid was paid, the claimant giving bond with security [to refund said sum to the Secretary of the Navy on his demand therefor] on account of such payment, but no demand for any refund was ever made upon it. At the time and prior to the execution of the modification of said contract the claimant was by reason of the delays *and* [refusal] of the Government aforesaid embarrassed financially and unable to procure money elsewhere; and in consideration of the payment being made as aforesaid the claimant, as recited in said modification, released the defendants "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the defendants" to comply with said contract "or on account of any delay hitherto occasioned by them."

To the delays of the Government, the signing of the modification of the contract and the release as aforesaid, the claimant verbally objected, but the Secretary of the Navy refused to make said payment on any other terms.

Thereafter on February 1, 1896, under similar circumstances of financial embarrassment, [caused] as aforesaid, and in order to relieve the claimant financially from such embarrassment a further modification of the contract, as set forth in the petition as "Exhibit W. C. & S. No. 3", was entered into between the parties, the claimant, as before, executing a bond with security to refund the same on the demand of the Secretary of the Navy, the payments being made, as therein stated, in consideration of a like release "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the defendants" to comply with said contract "or on account of any delay hitherto occasioned by them". No demand was ever made upon the claimant for any refund of the amount so paid it under said agreement.

To the delays of the Government, the signing of the modification of the contracts, and the release as aforesaid, the claimant verbally objected, but the Secretary refused to make said payment on
70 any other terms.

To amend the 6th finding, insert after the word contract in line 3,

"The following account was stated under the direction of the Secretary of the Navy (insert account).

JNO. C. FAY,
Attorney for the Claimant.

HOLMES CONRAD,
Of Counsel.

The words embraced in brackets are the amendments requested; the balance is as found by the Court.

71 *d. Order Remanding Case to Law Calendar, etc.*

Filed June 9, 1910.

Order.

This case is remanded to the Law Calendar for oral argument on the points named in memorandum.

Memorandum.

(1) Is the contract or the final release hereunder the subject of reformation when the claimant could by diligence have protected itself against the mistake of which it complains by securing a provision in the release reserving for determination by the court the validity of the claims it now asserts, as was done in the case of the Alabama (216 U. S., —)?

(2) If they are the subject of reformation, is the evidence adduced competent and sufficient therefor?

(3) Both parties are at liberty to take further testimony on or before October 1, 1910.

BY THE COURT.

72 *e. Evidence Adduced by the Claimant.*

Index.

Deposition of Benjamin F. Tracy.
Memorandum of agreement referred to.
Deposition of Lewis Nixon.
Charles Eaton Creecy.
Hilary A. Herbert.
Philip Hichborn.
Exhibits referred to (not printed).

Deposition of Benjamin F. Tracy, for Claimant, Taken at New York City on the 18th Day of September, A. D. 1907.

Claimant's counsel, John C. Fay, esq.; defendants' counsel, F. W. Collins, esq.

BENJAMIN F. TRACY, having been produced as a witness on behalf of claimant, was by me sworn to tell the truth, the whole truth, and nothing but the truth relative to said cause, and thereupon deposed and said that his name is Benjamin F. Tracy; that his occupation is a lawyer; that he is 77 years of age; that his place of residence is Tioga County, N. Y.; that he has no interest, direct or indirect, in the claim which is the subject of inquiry, and that he is not related to the claimant.

And thereupon said Benjamin F. Tracy was examined by John C. Fay, counsel for claimant, and in answer to interrogatories testified as follows:

Direct examination by Mr. FAY:

1. Question. You were formerly Secretary of the Navy, during the administration of President Harrison, were you not?

Answer. I was.

73 2. Question. As Secretary it became your duty to carry into effect the provisions of the act of June 30, 1890, contract for three coast-defense battle ships for increasing the naval establishment of the United States?

Answer. Yes.

3. Question. Under the authority and in pursuance of that law, when and with whom did you enter into contracts?

Answer. With the Union Iron Works for building the Oregon, known as battle ship No. 3, and with Cramp & Co., Philadelphia, for battle ships Indiana and Massachusetts, known as No. 1 and No. 2.

4. Question. Were those ships to be built under the same plans and specifications and under the same form of contract?

Answer. They were.

(Government's counsel objects that the contracts and plans themselves are the best evidence.)

5. Question. I call your attention to the printed copy of the contract for the Massachusetts as printed in Document 69, second session, Fifty-fourth Congress. Does that accord with your general recollection of the form of the contract?

Answer. I haven't read it from beginning to end, but I have looked at it, and so far as I have read it, it conforms to my recollection of the contract.

6. Question. In the third article of the contract there seems to be a provision that if the United States was in default in furnishing the armor at the time and in the order that it was necessary to carry on the work—under a state of circumstances like that the United

States had agreed to take the vessel without armor. Have you any general recollection of such a provision?

Answer. My recollection about that is very indefinite. I have read the provision of the contract and I have no doubt that it sets out correctly the contract as was understood by both parties at the time.

GOVERNMENT'S COUNSEL: Same objection.

7. Question. Calling your attention to the sixth paragraph of the ninth article of the contract, which is in these words:

"When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled within ten days after filing an acceptance of its claim to receive the said special reserve or the surplus, if any, of the said reserve fund or so much of either as it may be entitled to on the execution of a final release from the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of this contract."

I would inquire whether at the time of the execution of the contract by you on behalf of the United States, what claims you understood were to be covered by that final release?

COUNSEL FOR THE GOVERNMENT: Question is objected to as incompetent and an attempt at this late day to interpret or explain the provisions of a contract that was reduced to writing and the language of which is plain and unambiguous and does not demand interpretation.

Answer. I did not understand that the party of the first part was to be called upon as a condition of receiving the contract price to be paid for the construction of the ship to release any claims
74 that he might have against the Government for a breach of the contract on the part of the Government.

(Government's counsel moves to have the answer of the witness stricken from the record in accordance with objections heretofore made, it being improper and inadmissible to attempt to explain or vary the terms of the written contract by testimony taken at this time.)

8. Question. General, I would call your attention to the words that that final release was to be in such form and should be approved by the Secretary of the Navy. That left it with the Secretary of the Navy to frame the release, did it not?

Answer. I so understood it.

9. Question. And if it had become your duty as Secretary of the Navy to have framed the release under the terms of that sixth article, as I understand from your answer, you would have framed it so as to exclude the class of claims you say you do not understand was embraced in it?

(Government's counsel object to the question as leading, suggestive, and argumentative, and for the reason that he is asking the

witness what he would have done in a case which was not presented to him for his official action and involves a knowledge at this time of what he would have done at that time.)

Answer. Had I been called upon to frame a receipt under that contract and it appeared to me at the time that the contractor had sustained serious damage by reason of the breach of the contract on the part of the Government I should not have required him to have released those claims as a condition of paying him what was due him under the contract.

10. Question. If during the building of this vessel the United States had been in default in the performance of its part of the contract and in furnishing the armor and protracting the time for finishing the vessel, causing expense for the care, maintenance, and insurance for the preservation of the vessel, please state whether or not it was your understanding or intention that such final release was or was not intended to include claims of such character.

GOVERNMENT'S COUNSEL: Objected to for the reason given above.

Answer. At the time of making the contract, of course, it could not have been known whether such a contingency would have arisen, and what would or would not have been my action is supposiiti-ous, and I do not suppose I had any understanding about it at the time; but before the expiration of my term of office it did become apparent that, owing to the time taken to perfect the armor that was to be put on the ship, there were great delays. My recollection is that at the time of making the contract ordinary steel armor was contemplated, but after a lapse of a short time the subject of nickel steel was called to my attention, and I began an investigation of the merits of nickel steel as an armor as compared with all steel, and that investigation was running on for some considerable time, and resulted in a trial of the various kinds of armor at Annapolis. There were three kinds of armor subjected to the test at that trial—one, an English compound armor; another, all-steel armor; and a third of nickel steel. The all-steel armor and the nickel-steel armor I had manufactured in France, our armor plants not being in condition at that time to manufacture either. That test proved the superiority of
75 nickel steel over the English compound, or over the all-steel armor, which had been contemplated by my predecessor, Mr. Whitney. But following that, soon after, came the suggestion of hardening the nickel-steel armor under what was known as the "Harvey process." Experiments in that direction were undertaken and carried on for a long, long time. Before we reached a definite conclusion of what kind of armor to use and before the harveyized nickel-steel armor was manufactured, it became very apparent that the Government would not be able to furnish the armor within the time stipulated by the contract. My attention was called to this fact by the Union Iron Works, who had the contract for the manufacture of the Oregon, and it was represented that serious loss would accrue to them by the carrying of this ship and paying insurance thereon because of the delay of the Government in furnishing the armor, and they asked me to enter into a supplemental contract,

a copy of which has been shown me in Document 69, Fifty-fourth Congress, second session, page 126, by which it was provided:

"That in case the party of the first part should be unable to complete the said vessel within the period of three years and five months from the date of said contract as aforesaid, exclusive of any extension of said period that may be granted under the provisions of the ninth clause of said contract for causes other than delay in the delivery of armor by the Government, then, and in that case, the cost during the time of such delay of keeping said vessel insured and of keeping and taking care of her and of the extra docking and painting of the vessel shall be ascertained and determined by the board of changes on said vessel and added to the price stipulated in said contract for the construction of the vessel."

(Government's counsel objects to the latter portion of General Tracy's answer and moves to strike the same from the record as irrelevant and immaterial to the issues in this case.)

11. Question. The effect of that supplemental contract, General, was to relieve the United States of the obligation in the third paragraph to accept the vessel in an unfinished condition, was it not?

GOVERNMENT'S COUNSEL: Same motion, and as leading and suggestive.

Answer. Yes; the effect of it was to compensate the contractor for the damages which he would sustain as ascertained by the board of changes by reason of the failure of the Government to furnish the armor as stipulated in the contract.

12. Question. Do you recollect the building of the cruisers New York and Brooklyn?

Answer. Yes; recollect it very well.

13. Question. Battle ship Iowa?

Answer. Yes.

14. Question. Columbia?

Answer. Yes.

Cross-examination by Mr. COLLINS:

15. Cross-question. General, if I understand you correctly, you do not mean to be understood as stating that at the time the contract in suit was drawn and executed between the Government represented by yourself as Secretary of the Navy, and the claim-
76 ant company, that you had in mind or that the claimant company had in mind definitely and specifically the probable failure or possible failure on the part of the Government to secure and deliver to the claimant company armor at such times and in such manner as should be called for by the contractor?

Answer. All I can say on that subject is this: That at that time my predecessor had entered into a contract with the Bethlehem Steel Company for founding an armor plant and had made a contract with that company for all-steel armor. Their plant was not completed at the time and it was not known how soon it would be completed. Then came the question of nickel-steel armor and then

afterwards the harveyized nickel-steel armor. Now, in what precise condition those matters stood at the time of making this contract, November 19, 1890, I can not recall without something to refresh my memory, and therefore I can not say definitely whether the possibility of our being unable to furnish armor that was contemplated to be furnished at the time of making the contract was considered by me or not.

16. Cross-question. Now, General, you have testified with relation to an understanding which you had at some time to the effect that the provision relating to the final release of the ship did not cover and was not intended, according to your understanding, to cover defaults on the part of the Government relating to deliveries of armor plate. I may misunderstand you, but my understanding of your direct examination was that you had an understanding at some time that the contract did not cover the damages which might be sustained by the contractor by reason of the failure of the Government to perform the contract on its part; am I right?

Answer. Yes.

17. Cross-question. When did you obtain that understanding?

Answer. Well, it would be correct to say that I always had that understanding, but I hadn't any realization that the Government was going to fail to perform the contract on its part for a long time after the making of the contract.

18. Cross-question. That being true, General, why is it that the contract did not contain a provision to the effect that in case of default on the Government's part, that the Government should be subject to and liable for the payment of damages?

Answer. In the first place, according to my own impressions now, the contract was a stereotyped form of contract that was used in the Department and was adopted without any question, and my second answer is that I should not regard it as necessary to have it in the contract at all. It would follow, if the Government failed to perform its contract as stipulated that the contractor was entitled to damages sustained by reason of that breach, whether put in the contract or not.

(Government's counsel moves to strike the last portion of the answer of the witness from the record as inadmissible and as being the opinion of the witness upon a matter of law.)

19. Cross-question. If I understand you correctly, General, you did state in your direct examination in effect that at the time the contract was drawn you could not have forecasted your official action with relation to the matters covered by the release. Am I correct in that, or the form of the release?

77 Answer. Yes. I could not forecast it until the question arose and I knew the facts on which I was to pass.

20. Cross-question. Now, General, in drawing these contracts for the construction of battle ships and cruisers, you were limited as to the amount of money that each ship or cruiser should cost by the Government, were you not?

Answer. Yes; exclusive of armor and armament.

21. Cross-question. Do you now recall what was the amount of money that Congress had appropriated for the construction of the ship Massachusetts?

Answer. Well, it would be guesswork for me to do it without refreshing my mind, but I think it is $3,000,000. Am I correct? [Mr. Fay—It was $4,000,000.] No, I would not have remembered it without refreshing my recollection.

22. Cross-question. Now, your understanding of the provisions of the contract with relation to the question of damages that may or may not have been sustained by the contractor by reason of any failure or default on the Government's part is very largely a matter which has resulted from your reconsideration of the matter in question at the present time, rather than drawing on your recollection of the absolute facts within your knowledge and recollection at the time that these matters occurred, is it not?

Answer. I think my answer ought to be in the affirmative—that it was—but I am not entirely sure, for I do not carry all the phases of that question in my mind.

23. Cross-question. I just wanted to know how much of this you actually carry in your memory of the transaction itself at the time it occurred, and not what your present ideas with relation to the construction of the clauses of the contract are; in other words, I want you to differentiate between your present understanding, if possible, of these matters and your understanding at the time they occurred.

Answer. I do not suppose at the time of the signing of that contract that the question of what damages the contractor might sustain by reason of the Government's failure to perform the contract on its part was considered or thought of at all. I suppose it was assumed that the Government would perform its contract, and yet, in view of the condition of the armor, it may have been realized at the time of making the contract that there was a great probability that it would not. I am not positive about that.

24. Cross-question. In drawing the contract, General, it was your idea, was it not, that the total amount paid for the construction of the battle ship in question was not to exceed the amount covered by the contract price itself?

Answer. Not except in case of the failure to perform on the part of the Government and the damages sustained by the contractor by reason of that. I never considered that those damages constituted a part of the pay of the ship as mentioned in the contract.

25. Cross-question. When did you first consider the question of damages as arising to the claimant company by reason of the Government's default?

Answer. I do not know that I ever considered it in this case. I did in the case of the Union Iron Works, but in this case I was never applied to to consider it, and I do not know that I ever thought of it.

78 26. Cross-question. Either at the time the contract was drawn or at any time during the execution of the work thereunder, so far as your official connection with the same was concerned?

Answer. I can not answer that. Of course I knew during my term of office that there had been great delay in furnishing the armor, and I knew that the completion of the ships was being delayed by reason of that default of the Government, and I know in the Union Iron Works case I made this supplemental contract. I do not know that the subject was ever called to my attention by the Cramps at all in any way. If it had been, I certainly should have made the same contract with them that I made with the Union Iron Works.

27. Cross-question. If the circumstances in connection with the two cases had warranted it?

Answer. I should have made the same contract with them that I did with the other.

28. Cross-question. You do not know whether the same circumstances did prevail in the one as in the other?

Answer. No; it would take me a long time to refresh my memory on that subject so that I could express any opinion on it.

Redirect examination by Mr. FAY:

29. Redirect question. Brother Collins has asked you if the contract price wasn't all that you expected to pay for the vessel. I want to call your attention to the fact, if you recall it, that the contract provides for speed premiums for quite a large amount, and it also provides for changes which were to be estimated by a board of changes which might increase or diminish and which might very largely exceed it. Now, calling your attention to the question he asked you in regard to whether the subject of a default on the part of the United States was ever suggested or considered at that time, I call your attntion to the third article of the contract providing for the acceptance of the vessel in an unfinished condition.

Answer. Well, it would seem from that clause that the possibility of the failure of the Government to furnish the armor in time was considered.

GOVERNMENT'S COUNSEL: Objected to as leading and suggestive.

30. Redirect question. Then if that third clause of the third article of the contract had been carried out, these items for expense in the care and preservation of the vessel never could have occurred?

GOVERNMENT'S COUNSEL: Objected to for the same reason as above, and argumentative.

Answer. No.

31. Redirect question. You remember, General, what officer of your department had charge of the details of this drawing of the contract?

Answer. The Department of Construction.

32. Redirect question. Do you remember the name of the officer who was particularly active?

Answer. Wilson was chief constructor.

33. Redirect question. The officer in his bureau who was particularly in charge of it?

Answer. Hichborn was the chief under the constructor and had principal charge of drawing the specifications.

79 34. Redirect question. And so far as the legal part of it, the drawing of the actual contract?

Answer. The drawing of the specifications for these battle ships was done by Nixon. Mr. Nixon was a recent graduate from a foreign school—I think it was England—and he was on duty in the navy-yard in Brooklyn. I ordered him to report to the Bureau of Construction in Washington, and he was the chief draftsman of the battle ships. I know he reported to me repeatedly his progress in designing the battle ships, and they were changed, I think, not less than three times at my suggestion, changed radically, so I know that he was the man that did it, because I know that was the man that was in communication with me from week to week on the subject of those battle ships.

35. Redirect question. Now, do you recollect the particular officer who looked after the details of the preparation of the final contract?

Answer. I suppose Mr. Hichborn did, but I am not positive about that. I suppose it was Hichborn; that is my best recollection. He was chief under Wilson in the Bureau of Construction.

Recross-examination by Mr. COLLINS:

36. Recross-question. You were asked with reference to the form of this contract and stated, I believe, that it was a form that had been used in the Department for some time, What ships or cruisers had this same form of contract been used on before that time?

Answer. What I meant by that was that the formal part of the contracts were the same, I assume, as had been used in the Department from time to time, for a considerable time; they certainly had been used in regard to the New York, the Baltimore, the Charleston, the Philadelphia, and——

37. Recross-question. Are you certain that the same contract forms were used in connection with the ships you have mentioned as were used with the Massachusetts?

Answer. No, I am not certain; I never compared them; I assume that the formal parts of shipbuilding contracts are alike, varying only in regard to the stipulations that are necessary in order to describe and provide for the particular ship under construction, but I may be mistaken about that.

38. Recross-question. Now, General, in stating that a form of contract was used for this ship which had been in vogue or use in the Department, as you understood it, before that time, do you mean by that to state that you did not carefully examine all of the provisions of the contract as it came up before you on that account, trusting to your subordinates who had prepared and used this form of contract?

Answer. Well, I can say this; that I examined the contract carefully—the provisions of the contract carefully in every respect that related to the particular ship to be built, but I assume without positively knowing it, that some parts of the contract I regarded as formal parts of the contract and did not examine them as closely as I did others—undoubtedly read it you know.

39. Recross-question. Do you now have in mind that you scrutinized with any particular care or that your attention was called at that time to the clause in the contract which provides for defaults on the part of the Government in connection with the delivery of armor plate or other materials?

80 Answer. Well, I infer that from the clause in the contract providing that the ship may be accepted without the armor—third clause—as a matter of recollection; I should be unable to say that I do recollect it.

Adjourned subject to agreement of counsel.

NEW YORK, November 2, 1907.

Hearing resumed.
Present, same counsel.

By Mr. FAY:

40. Question. Since our last meeting, General, have you refreshed your recollection by an examination of your official reports; and, if so, do you desire to add to or change in any way your former statements?

Answer. I have and do. Since the last hearing I have refreshed my recollection by rereading my official reports for the years 1890, 1891, and 1892, and I find that the subject of nickel-steel armor had been under consideration for some time previous to the making of the contracts for the building of the battle ships, but nothing definite had been determined about it. I had entered into an agreement with the Carnegie Company to establish an armor plant, so we would have two armor plants, the Carnegie and Bethlehem, but the contracts, so far as I now remember, contemplated the ordinary steel armor. At the time of making the contract for building the battle ships there had been no definite contract with the armor manufacturers for the change of armor, and the whole thing was left in an uncertain condition at the time of making the contracts in question, and that, I assume, accounts for the presence of the proviso in article 3 of the contract, by which it was provided that the ships might be accepted without armor. Previous to the making of the contract for the building of the ships, November 19, 1890, the subject of nickel-steel armor had been under consideration and investigation, and a trial of three plates, one known as the English compound plate, the plate generally in use in the navies of the world at that time, the all-steel plate, the making of which had been contracted by my predecessor with the Bethlehem Company, and a nickel-steel plate which the Department had procured to be manufactured in France, was held at Annapolis on September 18 to 22, 1890, and this trial clearly demonstrated the superior qualities of the nickel-steel armor, but no contract had been made with the Bethlehem plant or the Carnegie plant for the manufacture of nickel-steel armor, and the whole question was unsettled and undetermined at the time of making the contract for the building of the ships. While the production of nickel-steel armor was contemplated at the time of making the contract for the construction of the

ships, yet how far our establishments could succeed in producing a satisfactory article was unknown and entirely suppositious. It was for this reason, I assume, that the proviso of article 3, providing for the acceptance of the ships without armor, was inserted in the contract as a precautionary provision.

In 1891 there came another suggestion as to armor, and that was hardening the nickel-steel armor by what was known as the Harvey process. Investigations and experiments in this respect were commenced in 1891, and were pursued continuously from that
81 time until July, 1892, when the final experiment which resulted in the determination to adopt the harveyized nickel-steel armor was reached.

It was this long delay, caused by the investigation and experiments, resulting in harveyized nickel-steel armor being adopted, which made it impossible for the contractors to complete their contracts within the time stipulated by the contract.

The details of this investigation and the various experiments, running from 1890 to July, 1892, are fully set forth in my annual reports as Secretary of the Navy in the years 1890, 1891, and 1892.

Direct examination closed.

Recross-examination by Mr. COLLINS:

41. Cross-question. At the time you made the contract in suit with the claimant company, was it not your purpose, and the purpose of the Department of the Navy, that the contract should cover and provide for all contingencies that might arise, so that in case of any default on the part of either party provision should be made therefor?

Answer. No doubt; that is the general purpose of every contract, I suppose, and at the time of making the contract we had supposed that we had provided for the contingency of the failure on the Government's part to produce the armor in time, by the third clause, which provided that the Government might accept the ship without the armor, but as the contract progressed and the experiments and investigations progressed, it became very apparent that it was not desirable for the Government to accept the ships under the third clause of the contract.

42. Cross-question. I am asking you now in relation to the understanding which you had of the contract at the time the contract was drawn up, and not later.

Answer. Yes; I supposed that the contract provided for all ordinary contingencies that was expected to arise, and that the third clause was specially intended to provide for the failure of the Government to produce its armor in time.

43. Cross-question. As a matter of fact, at that particular time, did you have thoroughly in your mind, so that at this time it is a matter of independent recollection with you, the possible failure on the part of the Government, or possible default on the part of the Government at all?

Answer. Oh, yes; clause 3 shows that, and the state of doubt as

to what armor would finally be adopted and what difficulties we would experience in the manufacture of it, under our new plants that were about to be established, were all considered and known, and it was for that reason, I assume, and I am confident of that, that that provision of clause 3 was inserted in the contract.

44. Cross-question. Was it not your purpose in drawing this contract to have it drawn in such a way that in no event the amount of money which the ship would cost should exceed the amount appropriated for that purpose by Congress?

Answer. Yes; that is to say, the provision of the act authorizing the building of these ships had named provisions—one, that the size of the ship should be about 8,000 tons and cost not to exceed $4,000,000 exclusive of armor and armament. The ships built were very much larger than the ships mentioned in the act. Instead of being about 8,000 tons, they were 10,200 and odd tons. I
82 assume I increased the size of the ships because on ascertaining, after careful investigation, that larger ships than I determined to build could be built in all probability within the limits of the appropriation. I did not intend to exceed that.

45. Cross-question. Were they so built within such limits?

Answer. I can not tell you. The contracts will show the contract price, and I know that it was much within the appropriation, although I have forgotten what the appropriation was. I knew at the time that it was far within the appropriation.

46. Cross-question. Are you certain they would be so, provided the United States was required to pay the amount of damages complained of by the claimant company, or do you know?

Answer. It was ample to cover any damages contemplated by me at the time by reason of any delay.

47. Cross-question. General Tracy, have you any interest, direct or indirect, in the result of this litigation?

Answer. Not the slightest that I know of.

48. Cross-question. Do you think the testimony which you have given in this case with relation to the intendments of the contract in suit, together with the conclusions which you have arrived at with respect to the same, are in any way influenced by the fact that you were induced to make a supplemental agreement with the Union Iron Works during the course of the construction of the Oregon for the delays which were likely to ensue in connection with the construction of said vessel by reason of the delay of the Government in delivering armor plate therefor?

Answer. I had entirely forgotten the fact that I made that contract with the Union Iron Works until my memory was refreshed by its production here. As a matter of distinct recollection, I would not have recalled the fact without the knowledge of the contract. The fact that I made and entered into that contract with the Union Iron Works when my memory was entirely fresh upon the subject, and every point of it, does tend to prove to my mind that the view that I have now expressed of the contract was the view that I entertained of it at the time when everything was fresh in my mind and memory.

Beyond that I can not say that the fact that I made that contract has influenced my testimony here.

49. Cross-question. I believe you did state, General, that the tests at Annapolis with relation to the question of the armor took place in September of 1890, whereas the contract in suit was not drafted until November of that year; that is true, isn't it?

Answer. That is correct.

50. Cross-question. That being true, and, if I understand you correctly, your stating that it was determined at that time that nickel steel was the most desirable armor to use in connection with battleship construction, do you know why it was that that specific kind of armor was not mentioned in the contract itself?

Answer. In the first place, as the Government was to furnish the armor and the shipbuilder was to put on the armor as furnished, the kind of armor to be furnished, whether all steel, nickel steel, or compound steel, wasn't material to be mentioned in the contract at all, but the whole subject at that time was too uncertain to predicate anything definite on it.

83 51. Cross-question. What steps, then, did you take after the trial in Annapolis in September of 1890 to determine whether nickel-steel armor could be manufactured in this country, and where?

Answer. Consultation with the manufacturers, the Carnegie Company and the Bethlehem Steel Company, and they concluded that they could manufacture it, but very soon after that—I can not recall now the definite date—the subject of Harveyized nickel-steel armor came up, and that threw the whole subject still more in doubt, until the final test at Bethlehem in July, 1892. The whole subject from 1890 to 1892 was under consideration, investigation, and experiment.

(Government's counsel now moves to strike out the testimony of this witness wherein he attempts to interpret, explain, or vary the terms of the written contract, as incompetent, irrelevant, immaterial, and inadmissible as evidence under the rules of evidence and of the court, it being an attempt to interpret and vary the terms of an instrument in writing, the same being a contract, which has already been executed, and a similar contract or a contract identical in terms, having been interpreted and adjudicated by the highest court.)

Examination closed.

BENJAMIN F. TRACY.
CHAS. A. CONLON,
Notary Public.

Memorandum of Agreement Relative to Changes in the Contract for the Construction of Seagoing Battleship No. 3.

Whereas, by the ninth clause of the contract entered into under date of November 19, 1890, by and between the Union Iron Works, a corporation created under the laws of the State of Carolina and doing business at San Francisco, in said State, represented by the

vice-president of said corporation, as party of the first part, and the United States, represented by the Secretary of the Navy, as party of the second part, for the construction of seagoing coast-line battle ship No. 3, it is stipulated that said vessel, including her hull, machinery, fittings, and equipment, with all her armor fitted, fixed, placed, and secured, shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of said contract, provided that all delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been delays operating upon the final completion of the vessel within the time specified therefor in said contract, shall entitle the party of the first part to a corresponding extension of the period prescribed for the completion of the vessel; and

Whereas by the eighth clause of said contract it is provided that the hull, machinery, fitting, and equipment of said vessel, and all materials and appliances provided for and used or to be used in the construction thereof, shall be kept duly insured, which insurance shall be renewed and increased from time to time by and at the expense of the party of the first part to said contract; and

Whereas by the third clause of said contract it is provided that the party of the second part to said contract shall furnish all armor, armor bolts and their accessories, to be used in the construction of the vessel, including such as may be required in the construction
84 of the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template sizes and shapes within reasonable manufacturing limits, as set forth in the specifications accompanying said contract, and drill and tap all necessary holes therein, as shown by the approved drawings and templates, excepting such armor, armor bolts, and their accessories as may be required in the construction of the protective deck of said vessel, and deliver said armor, armor bolts, and their accessories at such reasonable place or places in the shipyard of the party of the first part to said contract as may be designated by said party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the first part to said contract, shall at its own risk and expense, properly fit, fix, place and secure all armor to the vessel, including the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and protection of the guns and load positions, and furnish all other materials and labor required in the construction of said vessel and her machinery, fittings, and equipment as called for by the drawings, plans, and specifications accompanying said contract, it being provided, however, that if upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment, and all other work required under said contract, except the fitting, fixing, placing and securing of the armor for her side belt, casement, turrents, redoubts, barbettes, and conning tower, the party of the second part to said contract shall not have commenced the delivery of such armor to the said party of the first part, then and in such case the

vessel shall be subjected to the trial provided for in the tenth clause of said contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side belt, casement, turrets, redoubts, barbettes, and conning tower, shall be fulfilled, the vessel shall be accepted as provided for in the eleventh clause of said contract, and if the party of the second part to said contract shall not have commenced the delivery of the armor for the side belt, casement, turrets, redoubts, barbettes, or conning tower, when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing, and securing the armor for the side belt, casement, turrets, redoubts, barbettes, and conning tower shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in final settlement under said contract, and it being further provided that if the party of the second part to said contract shall commence the delivery of the armor of the side belt, casement, turrets, redoubts, or conning tower of said vessel, prior to her final acceptance, or within five months after either a preliminary or a conditional acceptance of said vessel, the party of the first part to said contract shall fit, fix, place, and secure the armor to the vessel, in accordance with the requirements of said contract and the drawings, plans, and specifications hereto annexed;

85 Now, therefore, in consideration of the premises, it is hereby expressly understood and agreed by and between the respective parties to the contract aforesaid, that in case the completion of seagoing coast-line battle ship No. 3 shall be delayed beyond the expiration of five months from and after the expiration of the period limited by said contract for the completion of that vessel, by reason of the failure of said party of the second part to furnish and deliver to said party of the first part armor to be used in the construction of said vessel other than that specified in the third clause of said contract, within the times required to enable the said party of the first part to complete said vessel within the period of three years and five months from the date of said contract, as aforesaid, exclusive of any extension of said period that may be granted under the provision of the ninth clause of said contract for causes other than delay in the delivery of armor by the Government, then and in that case the cost during the time of such delay of keeping said vessel insured, and of keeping and taking care of her, and of the extra docking and painting of the vessel, shall be ascertained and determined by the board on changes on said vessel and added to the price stipulated in said contract for the construction of the vessel.

In witness whereof, the respective parties hereto have hereunto set their hands and seals this 25th day of February, A. D. 1893.

UNION IRON WORKS,
By H. T. SCOTT, *President.*

Signed and sealed in the presence of—
J. O. B. GUNN,
Secretary Union Iron Works.

[Seal of the Navy Dept.]

THE UNITED STATES,
By B. F. TRACY,
As Secretary of the Navy.

SAM. C. LEMLY,
Judge-Advocate-General
(*As to B. F. Tracy, Secretary of the Navy*).

Deposition of Lewis Nixon, for Claimant, Taken at Washington, D. C., on the 27th Day of September, A. D. 1907.

Claimant's counsel, Messrs. John C. Fay and C. E. Creecy; defendants' counsel, F. W. Collins, Esq.

LEWIS NIXON, being recalled as a witness on behalf of the claimants, and by me sworn, before any questions being put to him, to tell the truth, the whole truth, and nothing but the truth relative to the above-entitled cause, was examined and testified as follows:

Direct examination by Mr. FAY:

Question. In 1890 where were you employed?

Answer. I was in the Navy Department, assistant naval constructor in the United States Navy, stationed in Washington, on duty in the Bureau of Construction and Repair.

86 Question. What particular duty were you assigned to?

Answer. The summer of 1890 I was in charge of the preparation of the plans and specifications for the battle ships Indiana, Massachusetts, and Oregon.

Question. As such, did you come in connection with Secretary Tracy?

Answer. Yes.

Question. Frequently or otherwise?

Answer. Frequently.

Question. Do you remember the making of the contract for the Massachusetts in November, 1890, between the United States, represented by Secretary Tracy, and William Cramp & Sons Ship and Engine Building Company?

Answer. I do.

Question. What did you have to do with the preparation of the contract and specifications for those vessels?

Answer. I prepared the specifications, wrote them all; that is, the hull specifications, and was in communication and conference with the Judge-Advocate-General on technical matters involved in the drawing of the contract. This contract was prepared some weeks in advance of its execution or of the letting of the contracts, the contract form being sent out with the proposals.

Question. Now I will call your attention to the third article of this

contract, in relation to the acceptance of this vessel under certain conditions without any armor [handing witness a paper]. Do you remember that?

Answer (after examining same). I do.

Question. What was the purpose and intent of that clause, as you understood it, in the preparation of the contract?

Mr. COLLINS: Question objected to as incompetent, and calling for the opinion of the witness, asking him to interpret, as it does, and explain the terms of a written instrument; also, the question is objectionable for the reason that the contract, or one identical in terms, has already been passed upon by the highest court, and for the reason that, therefore, this matter is res judicata.

Answer. The purpose of that clause was, as stated, to provide for the completion of the vessel without its armor, in case the Department would not begin the delivery of the armor and continue with diligence and in the times and order necessary to carry on the work properly, so that the losses due to such delays should not fall upon the contractor.

Mr. COLLINS: Government's counsel reserves the right to move to strike out the testimony from the record at the close of the same.

Question. Do you remember who framed that particular clause?

Answer. Well, it was actually prepared, of course, by the Judge-Advocate-General of the Navy. I was in constant touch with him while he did it.

Mr. COLLINS: Government's counsel objects to any and all questions relating to the contract in suit, for the reasons above stated, and saves his rights of objection in this manner.

Question. You are familiar with the items of the claim in this case, are you not?

Answer. Yes.

87 Question. If the provision in that third article had been carried out by the United States would any of these claims in suit have arisen?

Answer. No.

Question. I will call your attention to the sixth clause of the nineteenth article, in pages 28 and 29 of the record. I will ask you what claims were intended to be covered by the release called for in that sixth clause—what class of claims?

Answer. The claims that would naturally grow out of the building of the vessel; the special extras that would not have been passed upon until the time of acceptance. That was to be the final settlement for the ship, at which time all matters affecting the construction of the vessel outlined in the plans and specifications would have been adjusted.

Question. Was it, or not, the intention of that article, as understood by you, to embrace the claims arising by reason of the delay on the part of the Government in the furnishing of the armor?

Mr. COLLINS: Objected to for the reasons given above, and also for the additional reason that the question is leading and suggestive.

Answer. This is a clause which appears in the contracts for vessels built for the Government by contract. It is a clause which is intended strictly to be carried out in connection with the orderly progress of contract work, so that it may be terminated in a legal manner, and was not expected to cover the extraordinary condition brought about by the failure to deliver armor.

Question. So far as you know, was that understanding shared by the other officers of the Department that you were in consultation with?

Mr. COLLINS: Objected to, for the reasons given above, and for the reason that it calls for the opinion of the witness as to what was the understanding of other parties.

Answer. It was a matter of precedent, and our understanding of this clause could only be obtained from their carrying out any past contracts, and taking our understanding from such precedent, this was intended to be confined to claims growing out of actual construction—the completion of the contract; in other words, according to the plans and specifications.

Question. Who was the Judge-Advocate-General at the time?

Answer. Colonel Remy.

Question. Is he living?

Answer. No; he is dead.

Question. Who was the Chief of the Bureau of Construction?

Answer. Commodore Wilson.

Question. Is he living?

Answer. He is not.

Question. Do you remember who was his assistant chief?

Answer. Admiral Hichborn, at that time Captain Hichborn.

Question. Do you remember whether or not that sixth paragraph had been in use in the Department before that?

Answer. That, or a paragraph very similar to it, practically the same thing.

Question. Now, after the making of this contract and the building of these ships, you resigned from the Navy, did you not?

Answer. I did.

88 Question. And what did you have to do with the building of the ships?

Answer. I had charge of their building.

Question. What was your position?

Answer. Superintending constructor at the Cramps shipyards.

Question. And you built them successfully?

Answer. I built them successfully.

Question. During the building was there much delay on the part of the Government in furnishing the armor?

Answer. Yes, sir.

Question. How did that affect the Cramp Company financially?

Mr. COLLINS: Objected to as immaterial.

Answer. It caused them serious loss.

Question. Coming down to 1894, after the contract period had

expired, during the year 1894 how was the financial condition of the Cramp company?

Answer. The Cramps were heavy borrowers of money at that time.

Mr. COLLINS: Objected to as incompetent, irrelevant, and immaterial.

Question. In October, 1894, what can you say about their financial condition at that time?

Mr. COLLINS: Objected to for the same reason.

Answer. I only know from my contract with the management that they needed money very badly.

Question. What was the financial condition of the country?

Mr. COLLINS: Objected to as not the best evidence.

Answer. In the money centers of the East there was great scarcity of money.

Question. Do you remember whether or not the Government was putting out loans at that time?

Mr. COLLINS: Objected to for the reason last given, and because it is not the best evidence.

Answer. I do not remember.

Cross-examination by Mr. COLLINS:

(Government's counsel moves to strike the testimony of the witness from the record for the reason previously stated in his objections thereto.)

Question. If I understand you correctly, you say you had to do with the preparation of the specifications accompanying the contract?

Answer. Specifications and plans.

Question. And you also had something to do with the preparation of the clauses which entered into the contract?

Answer. There were a number of new conditions to be met on account of the fact that these vessels carried armor, and again on account of the fact that Attorney-General Garland had decided that certain of this armor could be charged to armament instead of to the preparation of hull and machinery, and it was necessary in this matter for the Judge-Advocate-General to take into consultation and conference some one with a technical understanding on this subject. For that reason I was in conference with him on a number of the clauses wherein they differed from the regular form that had been used in making contracts for naval vessels up to this time.

89 Question. Are you able to state at this time from your recollection what clauses entered into the contract in suit differed from the clauses of other contracts of like nature, and in what respects?

Answer. In the matter of the fitting of armor these contracts were drawn very largely upon the same general idea as those of the New York, the New York being one of the vessels which carried armor,

and in connection with her contract I was in conference with the Judge-Advocate-General just as with these.

Question. Did the contract in suit differ as to the matters to which attention has been called by Mr. Fay from the contract in case of the New York?

Answer. Not radically.

Question. You say "not radically?"

Answer. I do not remember enough to tell you the exact difference.

Question. Are you able to state from independent recollection what the points of difference were?

Answer. Seventeen years is a long time ago. The exact difference I can not remember. I remember many nights working with the Judge-Advocate-General up until as late as 2 o'clock in the morning.

Question. At this time, if I understand you correctly, it is impossible for you to state just what matters you were engaged upon, so far as the same differed in any respect from the clauses which entered into the previous contracts, particularly referring now to the contract with respect to the New York.

Answer. I only know that I suggested the phrase at the time, "and in the order necessary to carry on the work properly."

Question. That is, referring to the deliveries of armor.

Answer. Yes, where such armor had to be delivered by the Department. I cannot remember which one it was written into first.

Question. I believe you stated that you were responsible for the clause appearing in the third paragraph of the contract to the effect that—I quote only in part—"within the times and in the order required to carry on the work properly," referring to deliveries of armor by the United States Government.

Answer. I suggested that particular clause or expression.

Question. When did that particular clause or expression first appear in these contracts, if you remember?

Answer. I do not remember.

Question. Are you willing to say that that particular clause, or that portion of the third paragraph which I have quoted, did not appear in the contract relating to the construction of the New York?

Answer. I could not tell you; I do not remember.

Question. The time, then, when it was suggested by you, and the vessel in the contract of which it was first incorporated, you are not prepared to state?

Answer. No; it may have been in the New York, but I do not remember.

Question. Now this clause relating to the completion of the vessel without armor in order to secure a trial and the practical delivery of the ship to the United States Government, and the saving of further expense due to cost of upkeep and maintenance by the claimant company, do you remember when that was first devised and inserted in one of these contracts, and which one of the contracts it was first inserted in?

90 Answer. My impression is that this first appeared in the form—we have it here in connection with the battle ship contracts.

Question. The Indiana class?

Answer. Yes.

Question. Now coming down to the sixth subdivision of the nineteenth paragraph on page 29 of the record, you have attempted to interpret that clause as not intended, if I understand you correctly, to cover claims other than those growing out of the construction of the vessel proper, have you?

Answer. I interpreted it in connection with paragraph 3, which, if it had been carried out, being a part of the actual construction of the vessel, would have already have provided for this particular contingency, and it would not have been necessary to have anything special. This was for the purpose of carrying out the plans and specifications of the contract as drawn.

Question. It was the purpose of the Department in the contract in suit to cover all the contingencies that might arise, so that in case of default on the part of the claimant company, or in case of default on the part of the Government of the United States, that those defaults should be covered by the contract, was it not?

Answer. Yes, and that was the reason for paragraph 3, so that the Department, if it was lax in delivering the armor, would let the contractor finish his work and take the boat to the navy-yard and complete the armor.

Question. And there was a clause in the contract which provided that on default of the Government the claimant company should be entitled to an extension of the contract time was there not, and was it not your view of the case that in case that extension was granted it was intended to cover all the relief to which the claimant company was entitled under the contract?

Answer. Certainly not. The mere fact of giving them more time to build the ship is to make the contractor spend more money. It is a disadvantage to him.

Question. But that was mentioned in the contract?

Answer. It was not exacting penalty for overtime in case such excess time were the direct cause of the party of the second part.

Question. But it was mentioned in the same part of the contract and paragraph of the contract in which the penalties were referred to and mentioned, was it not?

Answer. Oh, yes; it was a part of that, as I have attempted to explain.

Question. Now do you think you carry as a matter of independent recollection at this time the intendments of yourself and the Secretary of the Navy, your associates in the Department of the Navy, with relation to the clauses which entered into this contract, so that with any degree of certainty at this time you could testify?

Answer. I have always considered that the design of these three ships was the most important thing that I have done during my lifetime, and the various developments growing out of the design of these ships the preparation of their specifications, the study of the contract repuirements as applied to such work, which at that time had not been attempted in the United States, are very keenly impressed upon my memory. Therefore, I do think that I can testify with accuracy.

91 Question. You have already stated, have you not, that at this time, after the lapse of seventeen years, you can not attempt to differentiate between the clauses that enter into this contract and the clauses that enter into preceding contracts, particularly that for the construction of the New York?

Answer. Because the New York and the Indiana and the Massachusetts, in so far as the fitting of armor is concerned, were very intimately related, and forms of expression which fitted the case of the New York were embodied in the contracts for the Indiana and Massachusetts, and for this reason it would be impossible at so late a date to remember just when the wording changed from one contract to another, but the Judge-Advocate-General did not like to make changes in his contract and much preferred them to follow, as far as possible, the phraseology which had already been found to answer in the construction of ships.

Question. That is the very idea I have in mind, that you are unable at this time to say in what respect the phraseology of the contract for the Indiana, Massachusetts, and Oregon differed from that of the phraseology with respect to the New York and some other ships which preceded the Indiana, Massachusetts, and Oregon.

Answer. I am, but I can recollect very clearly what the intention of the contract, as it is, was to bring out, and how it was to effect the carrying on of the work.

Question. Now your particular interest in this contract was not with relation to the questions of the damage or the law questions that might be wrapped up in the case, but it was with reference to the technical part of it, you being a naval expert, was it not?

Answer. Absolutely. I was a technical man, and my chief desire was to make these boats the very best of their class in the world, and all my energies were bent to this end, and I was taken into conference by the Judge-Advocate-General on many matters affected where there might be a cause growing out of the character of this contract and its magnitude for modifying the phraseology which he had adopted for previous contracts.

Question. But you are not certain at this time that the Judge-Advocate-General consulted you with reference to any changes he observed with reference to the matters of which you have been interrogated by Mr. Fay?

Answer. Well, I remember that during the preparation of the plans and specifications and contracts of the battle ships that I was many times in conference with the Judge-Advocate-General, because my time was overtaxed as it was, and after a hard day's work the Judge-Advocate-General would send for me and keep me hard at work late into the night, so that I know I did discuss the contract in intimate connection with these particular ships.

Question. You have already testified to that, but you have not answered my question.

Answer. I am trying to answer it. The third article we discussed several times. I can explain this from my memory, in that I asked whether legally the expression "commence the delivery of armor" meant that such beginning contemplated beginning in the way expressed in the contract—that is, at the times and in the order

necessary to carry on the work properly—and the Judge-Advocate-General said that it did. Later on, Mr. Cramp, I think it was,
92 seemed to have doubts upon this subject, and the Judge-Advocate-General gave him practically the same assurance that he gave to me when I raised the question, and, in order to confirm this, wrote into the contract that it should be continued with due diligence.

Question. Now, what other features do you distinctly recall at this time?

Answer. There was one clause, but I do not remember what it was, that the Judge-Advocate-General asked me to outline, and I did so, and we started one evening at 11 o'clock and continued until 2 o'clock in the morning writing and rewriting this clause, and finally ended by leaving it as first written. Just what clause it is, I do not remember.

Question. Now, outside of the matters just referred to by you, you have no distinct recollection at this time of any particular clauses of the contract which were discussed at length between yourself and the Judge-Advocate-General prior to the embodying of the same in the contract itself?

Answer. We discussed every clause in the contract wherein there was a new relation brought about on account of the fitting of the armor; where the phraseology adopted for the New York would fit, it was incorporated. Where slight modifications were required they were discussed very fully and at great length, and the modifications made. Just those modifications, as I have already testified, I do not remember.

Question. But those related to the fitting of the armor?

Answer. To the fitting of the armor and the various things growing out of that.

Question. Now, have you at this time any distinct recollection of having discussed with the Judge-Advocate-General, or with the Secretary of the Navy, the matter contained in the sixth subdivision of paragraph 19 of the contract?

Answer. No; that is a standard form. That was something that was established by precedent and had worked all right.

Question. Used in other contracts?

Answer. Yes.

Question. But if I understand you correctly, you do not think that that was intended to relieve the Government of any claims for unliquidated damages. Is that your idea?

Answer. Damages that might have been caused by the party of the second part outside of the losses that were to be prevented by an application of paragraph 3, which paragraph was never carried out, and the reason it was never carried out, the Government's refusal to carry it out was covered by this clause if they arose from the construction of the vessel.

Question. You speak about the Government's refusal to carry out the third clause of the contract. Are you personally cognizant of that matter?

Answer. Yes.

Question. Is it not a fact that the Secretary of the Navy appointed

a board to examine the ship and see whether or not—I am referring now to the Massachusetts—she was ready for her trial trip and the board reported adversely.

Answer. The boat was to be ready as a completed battle ship, practically. The armor was not on her sides. There were a
93 great many parts that were not connected. It would have been necessary to build in the apertures for the armor some false structure and take this out again. It was considered that this was inadvisable, although the contractor certainly showed that he intended, in case of the Indiana, for example, to carry out paragraph 3, because he spent a great deal of money in having his preliminary trial trip, and when he wanted his official trial trip it was refused.

Question. Was it the Indiana that the offer was made upon or the Massachusetts?

Answer. The Indiana, I think, was the one we had all filled up.

Question. Are you certain of that?

Answer. I am as certain as I can be. My impression is it was the Indiana.

Question. Are you able to state at this time that the vessel, whether the Indiana or the Massachusetts, was in all respects prepared by the contractors for this trial trip provided for by paragraph 3 of the contract?

Answer. Yes; that is a question which involves technical judgment, and the armor is so intimate a part of the construction of the boat, being incorporated into the structure, the question of stresses and strains in relation to it being subject of calculation, that certain parts could not be completed until the armor is actually in place, and with this statement I answer the question as above.

Question. In view of the fact that you stated that the vessel, whichever it was, was ready for the trial trip, I will ask you to state her condition at that time.

Answer. The whole side in the wake of the armor belt was open. The decks were open around the barbettes, but the ship with the sides filled in and the apertures for the barbettes covered could be weighted to the proper displacement, the engines could be run, and all the various auxiliaries and the equipment necessary for taking this boat to sea with the consent of those who insured her, who were very exacting as to the seaworthiness of the vessels which lay underwrote, was in place. The vessel did go to sea and had a satisfactory preliminary trial. She could have been taken out on an official trial, the official speed proven beyond a question, and paragraph 3 could have been put into application.

Question. In making this answer you are not certain whether you are referring to the Indiana or the Massachusetts?

Answer. The vessel we had the preliminary trial on, which affects our procedure in connection with both boats.

Question. Now, you say she could have had this sort of a trial, and that she did have a builder's trial. Were you present at the builder's trial?

Answer. Yes; I was present at all trials.

Question. Were you present at the builder's trial on the Massachusetts?

Answer. Yes; I went on all trials of the Indiana and Massachusetts.

Question. But you in testifying as you have heretofore are not certain that you are testifying with respect to the Indiana or the Massachusetts?

94 Answer. No. We had the Indiana's trial first, and, as affecting paragraph 3, I have to testify as I have; that is, the application of paragraph 3.

By Mr. FAY:

Question. Now, as a matter of refreshing your recollection, I hand you the contract for the New York and call your attention to the third article, and after reading that see if it refreshes your recollection.

Answer (after reading the same). "Within the times and in the order required to carry on the work properly" was used in the New York's contract, but the possible contingency of the Department not furnishing armor within the times and in the order required to carry on the work properly was not provided for.

Question. The acceptance of the vessel without armor was not provided for?

Answer. Yes. This can be understood, because the armor was much easier to make and much simpler than in the case of the Indiana, and the possibilities of delay were small as it seemed at the time of writing the contract.

Question. The New York was the first vessel that had armor on it?

Answer. Well, we bought the armor for the Miantonomoh, which is a part of the scheme of the new Navy, from England, but as they were finished in the navy-yard there was no question of the contract or phraseology involved in connection with the monitors.

Question. Who designed the Indiana, Massachusetts, and Oregon?

Answer. I did.

Question. And you practically built the Indiana and Massachusetts?

Answer. I was superintending constructor for the Cramp company, the company which had the contract for their building.

By Mr. COLLINS:

Question. You said something in regard to the financial embarrassment to which the company was subjected in connection with the matters of delay in the delivery of armor. Are you willing to state at this time that there was not a fair margin of profit in the construction of the Indiana and the Massachusetts to the claimant company?

Answer. There would have been a fair margin of profit had the contract been carried out, as the contractor expected to when he made his estimate. I think the conditions brought about from the nondelivery of armor, and the vexatious delay to which the contractor was subjected, changed a very profitable contract into a poor one.

Question. Are you willing to state at this time there was no margin of profit in this ship?

Answer. I have never seen the final cost sheets of this work, as I

resigned as superintending constructor of the Cramp company before they were prepared.

Question. Now you speak about the financial embarrassment to the claimant company; do you mean to say that that financial embarrassment was due entirely to the failure of the Government to deliver armor at that time or was not a portion of that embarrassment due to other causes?

95 Answer. Well, when one expects to receive a final payment and carry out a contract in which there is a substantial margin of profit and this contract was extended many years through no fault of the contractor, with attending losses, the embarrassment which might have been due to others was certainly enormously augmented by the causes attributed to delays on the Indiana and Massachusetts.

Mr. COLLINS: I do not think you have answered the question, and I move to strike out the answer as not responsive.

(Question repeated.)

Answer. A portion of it was undoubtedly due to other causes, and some of these same causes are chargeable to the Government.

Question. What were the other causes?

Answer. Many changes made in the construction of the vessel; very serious reasons.

Question. Those changes were provided for by the contract itself, were they not?

Answer. They were not altogether. They were forced by the Government.

Question. Are you referring now to changes of the vessel in suit or to all of the ships which were in progress of construction by the claimant?

Answer. The serious delays on the Indiana and Massachusetts, practically all the delays on the Indiana and Massachusetts, were caused by the failure of the Government to deliver its armor.

Question. Were there not quite a number of delays on those ships due to changes of plans, etc?

Answer. Yes, and these changes were caused largely by the fact that the Department was aiming to simplify the construction of its armor. In other words, the efficiency of the vessel was sacrificed to make the armor easy of construction.

Question. Now, it is a fact, is it not, as testified to by Charles Cramp in his testimony in this case, that at that particular time battle-ship construction in this country, so far as this new type of vessel was in its infancy, and it was the desire of the Government to get the very best type of battleship that it could possibly obtain, and that that led to quite a number of changes even after the first plans and specifications were devised and gotten out? That is true, is it not?

Answer. There were some changes made. Some of these changes were not in the interest of the Government. The changes in the character of the armor, although causing the delay, were of tremendous interest to the Government and the Government profited by such change.

Question. Now, how much of the delay in connection with the construction of the Indiana and Massachusetts was due to changes of plans?

Answer. From 5 to 10 per cent, I should say.

Question. No more?

Answer. From 5 to 10 per cent, the ordinary structural changes.

Question. I am not referring to the changes in the character of the armor alone, but I am referring to any changes?

Answer. I say changes outside of the armor, from 5 to 10 per cent.

Question. Now, changes due to the armor?

96 Answer. About 90 per cent.

Question. Now, I want you to eliminate in your answer those delays which were caused to the contractor by the failure of the Government to deliver armor, and confine your answer to the changes in the armor plans themselves.

Answer. The changes in the armor plans themselves shortened the work. The armor was easier to install.

Question. So that you think from 5 to 10 per cent would cover that portion of the delay due to changes?

Answer. Yes, sir. Not due to changes in character of armor, you understand.

Question. But you think that changes in the character of the armor shortened the work?

Answer. No, sir; I did not say in the character of the armor. I said in the shape of the armor. The changes from the sloping armored bottoms of the turrets to the horizontal protection somewhat simplified the work. The delays due to nondelivery of the armor, however, arose from the fact that whether easier or hard to install, it was not on hand at all to install.

Question. Then you would not differentiate between the delays due to the failure of the Government to deliver the armor and the delays due to the changes in the character of the armor?

Answer. The changes in the character of the armor; that is, in its physical construction from the all-steel armor to the nickel steel, and then again to the harveyized nickel steel made directly in the interest of the Government naturally delayed the delivery of such armor, for had the original intention been followed of installing the armor which was being used with success at the times that the ships were designed—that is, had the all-steel armor been followed—it is very probable that the vessels would have been finished in contract time.

Question. You say it is very probable that if it had not been for the delays due to the deliveries of armor that the vessels would have been completed in contract time?

Answer. Yes.

Question. Do you know of a single instance wherein the claimant company have ever completed and delivered a battleship or an armored cruiser within a like period? I mean within a three-year period?

Mr. FAY: Objected to as incompetent.

Answer. I have never known a case where the conditions of a fail-

ure on the part of the Government to deliver its armor have not so operated as to make it impossible for me to answer this question.

Question. Do you mean to say by that that in every case, so far as your knowledge extends, there has been a failure on the part of the Government to deliver armor within the times and in the order called for?

Answer. I know of no case.

Question. Your connection with the Cramp company ceased in 1895?

Answer. Yes.

Question. Since that time you have had nothing to do with the company?

97 Answer. I was there for several years as consulting naval architect after that.

Question. Up to what time?

Answer. It was after 1900.

Question. After the time when your active connection with the company ceased, did you keep track of the work, so that you could state what time they took to deliver the vessels that were under contract?

Answer. As near as I can remember there have always been delays due to the failure of the Government to deliver its armor, and therefore it is impossible to say in this country whether a boat could be built within its contract time, provided the Government did its part and the contractor did his.

Question. Your connection with the Cramp company was quite intimate while you were there?

Answer. Yes.

Question. You have already spoken of financial embarrassment to the company by reason of the failure of the Government to deliver armor plate, and is it not a fact that there was more or less of mismanagement in the company there which, outside of the Government's default in the premises to which you have referred, led to this financial embarrassment?

Mr. FAY: Objected to as incompetent.

Answer. I do not consider that there was any mismanagement. There were tremendous losses entailed through the fact that the Cramp company were the pioneers in the heavy construction for the United States Government. They expected naturally that the boats would proceed in the same orderly manner as contracts which they had had in hand in the past had proceeded. The Department forced many changes which, as I have already testified, changed what should have been profitable contracts with good margins of profits into very poor contracts, and it was the unpreparedness of the Government to carry on its part which led to the losses, and not a fault in the management of the Cramp company.

Question. Is it not a fact that the Cramp company took many unprofitable merchant contracts at or about that time on which they lost considerable money, and that, in part, at least, will explain their financial embarrassment?

Answer. In carrying on shipbuilding work you are liable to make mistakes, and it is possible that in some of their contracts they lost money. But the largest contracts which they had in hand at the time were day's work contracts—the St. Louis and the St. Paul—where there was an assured margin of profit based on contract and percentage.

Question. Is it not a fact that in nearly all of their merchant-work contracts the Cramp company lost money?

Answer. I do not think so.

Question. Whereas on their Government work they made money?

Answer. No; I think it is probably the other way about. I did not have access to the cost sheets, as after 1895 I was a rival, and in some cases bid against the Cramp company, my relations being those of a technical consultant.

98 The examination by counsel being concluded, in answer to the final interrogatory by the commissioner, the witness says that nothing further at present occurs to him material to this case.

LEWIS NIXON.

Sworn to and subscribed before me this 27th day of September, 1907.

ROBT. L. MILLER,
Commissioner.

Deposition of Charles Eaton Creecy, for Claimant, Taken at Washington, D. C., on the 30th Day of September, A. D. 1907.

Claimant's counsel, John E. Fay, esq.; defendant's counsel, F. W. Collins, esq.

CHARLES EATON CREECY, a witness produced on behalf of the claimant, and by me duly sworn, before any questions were put to him, to tell the truth, the whole truth, and nothing but the truth relative to the above-entitled cause, was examined, and testified as follows:

In answer to the preliminary interrogatories by the commissioner, he states that his name is Charles Eaton Creecy; that he is 66 years of age; that he resides at No. 1307 Rhode Island avenue N. W., Washington, D. C.; that he is a lawyer; that he is interested in this claim as attorney for the Cramp Ship Building Company, but is not related to any of the members composing said corporation.

Direct examination by Mr. FAY:

Question. When were you employed by the claimant with respect to the claim in the suit now pending for the Massachusetts?

Answer. On the 24th day of March, 1896.

Question. Was that the same claim set out in the petition in the Massachusetts case?

Answer. The same claim.

Question. Where were you expecting at the time of the employment to prosecute the claim?

Mr. COLLINS: Objected to as incompetent and immaterial.

Answer. I had an idea that I could get the claim settled in the Navy Department, and a few days after I was employed I called upon the Judge-Advocate-General (Lemly) to see if I could not get him to go with me to the Secretary and agree to have a board of officers appointed to consider the claims of the Massachusetts and the other five vessels of the Cramps and have a report made to the Secretary as to what the board considered a fair amount to be paid for the damages. I thought that was the most expeditious way of settling it. Upon talking the matter over with Lemly he told me he would oppose the board being appointed for two reasons: First, for the reason that the Department had no jurisdiction of the question of damages and would not consider it; and, second, there was no money to pay it if it did consider it. But he said, "Why don't you do what has been done in the Richmond Locomotive case," and I found upon inquiry that the Richmond Locomotive Works had a precisely similar contract to the Cramps' Massachusetts con-
99 tract, and a claim for the same kind of damages caused by the delay of furnishing armor on the Texas.

Mr. COLLINS: Government's counsel moves to strike out the answer of the witness as not responsive to the question and for the reason that the same is incompetent and immaterial.

Question. Have you a copy of the contract with the Richmond Locomotive Works at hand?

Answer. I have. It is published in House of Representatives Report No. 60, Fifty-fifth Congress, second session.

Question. On what page is it?

Answer. It is on page 11 of the report, and was sent by the Secretary of the Navy to Congress in a letter dated December 20, 1895, which is published on page 7 of the same report.

Question. Does that contract contain the identical language in the sixth paragraph of the eighteenth article of the contract that is contained in the sixth paragraph of the Massachusetts contract?

Mr. COLLINS: Objected to for the reason that the contract itself is the best evidence of what is contained.

Answer. Precisely the same language.

Mr. FAY: Now I offer the report in evidence and ask that it be marked as an exhibit in the case.

Mr. COLLINS: Objected to as immaterial.

(The said report is marked "Claimant's Exhibit No. 1," and accompanies the deposition herewith.)

Question. What did you ascertain had been done with respect to the Richmond Locomotive case?

Mr. COLLINS: Objected to as immaterial.

Answer. I found that Congressman Wise, of Virginia, had introduced in the House a bill for the relief of the Richmond Locomotive Works, January 21, 1895, and that that bill had been sent by the Committee on Naval Affairs of the House on the 1st day of Feb-

ruary, 1895, to Secretary Herbert for his views. That bill is printed on page 5 of the report referred to. I found that the Navy Department, by Secretary Herbert, on February 27, 1895, returned the bill to the Committee on Naval Affairs of the House of Representatives, and Secretary Herbert stated he had no objection to the legislation proposed. That letter is to be found on page 5 of the report referred to. I found also that the language of the bill introduced by Mr. Wise, which the Secretary said he had no objection to, was put into the naval appropriation bill that was approved March 2, 1895, directing the Secretary of the Navy to audit and adjust the claim of the Richmond Locomotive and Machine Works, of Richmond, Va., against the Government of the United States for damages and losses sustained by the said Richmond Locomotive and Machine Works in the execution of the contract to construct and deliver the machinery required for the United States battle ship Texas, caused by the delays of the Government of the United States in the construction of the hull of said battle ship Texas, and to report to Congress at its next session what amount may be due to said Richmond Locomotive and Machine Works. I also found that in pursuance to that statute the Secretary of the Navy audited that account and reported by letter addressed to the Speaker of the House of Representatives,
100 dated December 20, 1895, the sum of $80,049.35 as due for damages, and he used the following language in the report:

"This amount includes all that the contractors are, in the opinion of the Department, justly and equitably entitled to, and as they have made oath to the correctness of their accounts it is recommended that an appropriation be made for the payment of this sum to be accepted by the contractors in full settlement of their claim."

Question. Is that to be found in that same report?

Mr. COLLINS: Government's counsel objects to the witness stating what he found in any reports or documents as not the best evidence, and moves to have the same stricken out, the reports themselves being the best evidence of what they contain.

Answer. It is on page 7 of the same report heretofore referred to.

Question. Was that appropriation made?

Mr. COLLINS: Objected to for the same reason as above.

Answer. That appropriation was made. It was cut down a little in Congress, but the sum of $69,550.39 was appropriated to pay the Richmond Locomotive and Machine Works in full of this claim for damages and losses incurred in the construction of the armored battle ship Texas by act approved May 7, 1898. The amount struck out has since that law been again recommended to be paid by Hon. Paul Morton, Secretary of the Navy, in the following letter, which is printed in House Report No. 7307, Fifty-ninth Congress, page 2, dated January 10, 1905:

"NAVY DEPARTMENT,
"WASHINGTON, D. C., January 10, 1905.

"SIR: I have the honor to acknowledge receipt of your letter of the 7th instant, inclosing a copy of an amendment intended to be proposed by Mr. Martin to the bill (H. R. 9548) for the allowance of

certain claims for stores and supplies reported by the Court of Claims, under the provisions of the Bowman Act, and requesting an expression of the Department's opinion as to the merits thereof, said amendment providing for the payment to the Richmond Locomotive Works, successor to the Richmond Locomotive and Machine Works, of the sum of $10,490.96, in full settlement of its claim for damages and losses incurred in constructing the machinery for the battle ship Texas.

"In this Department's letter, dated December 20, 1895, to the Speaker of the House, referred to in the proposed amendment, the claim of the Richmond Locomotive and Machine Works, amounting to $108,983.04, which had, in accordance with the authorization contained in the naval appropriation act of March 2, 1895, been audited, was allowed in the sum of $80,049.30.

"Said allowance included, with other items—

Interest	$8,740.24
Insurance	1,150.72
Security	600.00
	10,490.96

to which the contractors were, in the opinion of the Department, as stated in its said letter, justly and equitably entitled. These items were omitted by the Congress in appropriating for the pay-
101 ment of the claim in question, the reasons for which action are unknown to the Department, but it is, after careful reconsideration of the matter, still of the opinion that the contractors are entitled to and should receive the sum so deducted from their claim as audited and allowed.

"PAUL MORTON, *Secretary*.

"Hon. Francis E. Warren, Chairman, Committee on Claims, U. S. Senate."

(Mr. Fay offered in evidence House Report No. 7307, Fifty-ninth Congress, second session, dated February 6, 1907, marked "Claimant's Exhibit Morton No. 1.")

Mr. FAY: I now offer that copy of the act in evidence and ask that it be marked as an exhibit.

Mr. COLLINS: Objected to as not the best evidence, and objected to further that it is not pertinent or material to the issues involved in this case.

(The same is marked "Claimant's Exhibit No. 2," and accompanies this deposition herewith.)

Question. After having ascertained the proceedings that had been taken in the Richmond Locomotive Works, what did you proceed to do with respect to the Indiana and Massachusetts case?

Answer. After finding that Congress had passed a law directing the Secretary of the Navy to audit and adjust and report the amount due the Richmond Locomotive Works in the Texas case, I determined to follow that plan in the Cramp cases, and I employed at that

time to assist me in the prosecution of the cases Gen. M. C. Butler, of South Carolina, and we asked the Committee on Naval Affairs of the Senate to give us a hearing upon a bill authorizing the Secretary of the Navy to audit and adjust the claims of the Cramp company in the Indiana case. My reason for picking the Indiana case out of the six of the Cramp cases was that I only wanted one case to be sent at a time to the Navy Department, and I prepared a letter, addressed to the chairman of the Committee on Naval Affairs, the original of which was given to the chairman and printed copies given to each member of the committee at a hearing which they gave us a few days after the date of the letter, which was April 4, 1896. It is signed by M. C. Butler, but was presented by both of us, and we asked in that letter that the committee put in the naval appropriation bill, then pending, a similar authority to adjust the claims of the Indiana that they did in the appropriation act of the year before for the Richmond Locomotive Works.

Question. Have you a copy of that letter?

Answer. I have.

Question. Is this it [handing witness a paper]?

Answer (after examining same). It is.

Mr. FAY: I offer that printed copy in evidence and ask that it be marked as an exhibit in this case.

(The same is marked "Claimant's Exhibit No. 3" and accompanies this deposition herewith.)

Question. And a printed copy of the original was handed each member of the committee?

102 Answer. The original was handed to the chairman, and printed copies handed to each individual member of the committee at the hearing of the case before the Senate Committee on Naval Affairs which took place a few days after the date of the letter.

Question. What did the application to Congress result in?

Mr. COLLINS: Same objection, and also objected to as not the best evidence.

Answer. The result of that application to the Naval Committee of the Senate was instead of putting in the clause in the appropriation bill which we asked for, they put in the following clause in the naval appropriation bill for the fiscal year ending June 30, 1897:

"The Secretary of the Navy is hereby authorized and directed to examine claims against the Government which may be presented to him by contractors for the building of the hulls or machinery of naval vessels under contracts completed since January 1, 1891, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but were due to the action of the Government, and report to the next session of Congress the result of said investigation, and where said claims are in his opinion subject for the jurisdiction of the Court of Claims, or for the action of Congress upon the same."

Question. That is the act of June 10, 1896?

Answer. That is the act of June 10, 1896.

Mr. FAY: Now I offer that section from the act of June 10, 1896, which has just been read, in evidence.

Mr. COLLINS: Objected to as irrelevant and immaterial.

(The same is marked "Claimant's Exhibit No. 4" and accompanies this deposition herewith.)

Question. Now, in pursuance of that act, did you submit the claim to the Secretary of the Navy for the Massachusetts?

Answer. I presented printed claims of the Cramp company for the six vessels, including the Massachusetts, Indiana, Columbia, New York, Iowa, and Brooklyn.

Question [handing witness a paper]. Is that the claim you submitted and the date of it in the case of the Massachusetts?

Answer (after examining same). That is the Massachusetts' claim.

Question. September 30, 1896?

Answer. About September 30, 1896.

Mr. FAY: Now I offer that printed claim in evidence and ask that it be marked as an exhibit.

Mr. COLLINS: Objected to for the same reason.

(The same is marked "Claimant's Exhibit No. 4" and accompanies this deposition herewith.)

Question. Now what report did the Secretary make upon that claim, and where is it contained?

Answer. The report made by the Secretary of the Navy was addressed to the Senate and House of Representatives, dated December 8, 1896, and is contained in House of Representatives Document No. 69, Fifty-fourth Congress, second session.

Mr. FAY: I offer that document in evidence and ask that it be marked as an exhibit.

Mr. COLLINS: Objected to for the same reason.

103 (The same is marked "Claimant's Exhibit No. 5" and accompanies this deposition herewith.)

Question. Going back, had you been familiar with contracts of the Navy Department and their forms?

Answer. I had, because I was the president of the Pneumatic Gun Carriage Company, which had two contracts with the Navy Department.

Mr. COLLINS: Objected to as irrelevant and as immaterial.

Question. How early had you made a contract with the Navy Department?

Mr. COLLINS: Government's counsel makes the same objection.

Answer. One contract for a pneumatic gun carriage was with Secretary Whitney, representing the Navy Department, and myself, as president of the Pneumatic Gun Carriage Company, on the 9th day of January, 1888.

Question. Have you the original contract?

Answer. I have.

Question. Is that it before you?
Answer. It is.
Question. Please examine that original contract and see if this paragraph 6 under discussion is contained in that contract.
Answer (after examining the same). Yes; it is.

Mr. COLLINS: Objected to as not the best evidence.

Question. In the identical language?
Answer. In the identical language.

Mr. FAY: Now, I offer that contract in evidence. "Claimant's Exhibit No. 6."
Mr. COLLINS: Objected to as immaterial and not pertinent to the issues of the case, and as an attempt by parole to vary, correct, and interpret the terms of an instrument in writing which has been passed upon by the highest court.

Question. Are you familiar with the action of the Navy Department with respect to a similar claim for the Quintard Iron Works or N. F. Palmer & Co.?

Mr. COLLINS: Objected to as irrelevant and immaterial.

Answer. I am. I was the attorney for N. F. Palmer, Jr., & Co., known as the Quintard Iron Works, and drew the bill which resulted in the appropriation of the money to pay their claim. The claim of the Palmer company was for damages sustained by it under its contract for building the engines and boilers of the old Maine.
Question. The one that was blown up?
Answer. The one that was blown up. The claim was caused by the delays of the Government in not furnishing the armor for the vessel, and they were delayed in putting in the boilers and machinery in the same.
Question. Was that claim submitted to the Secretary of the Navy under this act of June 10, 1896?
Answer. It was.

Mr. COLLINS: Same objection, and also objected to as not the best evidence.

Question. Have you before you the report of the Secretary of the Navy in that case?
Answer. I have.
Question. What is its designation, and what does it contain?
104 Answer. The letter of the Secretary of the Navy reporting upon this law that had been passed and approved June 10, 1896, is contained in document No. 68, House of Representatives, second session, Fifty-fourth Congress.

Mr. FAY: Now I offer that document in evidence and ask that it be marked as an exhibit in this case.
Mr. COLLINS: Objected to as immaterial.
(The same is marked "Claimant's Exhibit No. 7" and accompanies this deposition herewith.)

Question. What did that result in finally?

Mr. COLLINS: Objected to as not the best evidence and immaterial.

Answer. The Palmer company declined to bring suit in the Court of Claims as the Secretary recommended, preferring to prosecute their claim in Congress. I drew a bill directing the Secretary of the Navy to pay the amount claimed, and had it introduced in the Senate and referred to the Committee on Claims. That committee referred it to the Secretary of the Navy for his report, and the Secretary of the Navy reported back to Congress by letter under date of January 10, 1903, which letter is to be found in Senate Report No. 118, Fifty-eighth Congress, second session. The Secretary of the Navy at that time was W. H. Moody. The Secretary stated in this letter, "The Department concurs in the views of the Bureau, and approves the statements made by them of the amount to which said company is entitled on account of the matters set forth." The Bureau officers in their report recommended the payment of $63,-620.59, and said:

"The claimants are now barred by the statute of limitations from prosecuting this claim before the Court of Claims.

"The Department, having referred your letter and accompanying documents to the bureaus of Construction and Repair and Steam Engineering, quotes below their report in the premises:

" 'It appears that all the information from the files of the bureaus necessary to a recommendation in this case is contained in the documents herewith.

" 'We are of the opinion that the claimants are justly entitled to some compensation and that amounts should be allowed on the following points:

" '(1) Interest on reservations of contract payments for the time delayed through fault of the Government. * * *

" '(2) Expenses of dock trial over and above any expense of such dock trial as is usual and necessary for every contractor to make at his own expense under the fulfillment of his contract.

" '(3) Expenses of care and preservation of machinery during the time its acceptance was delayed through fault of the Government.

" '(4) Additional cost of insurance and bond required by the contract for the same period.

" 'It does not appear from these papers, but can be determined from the record of the Department, whether the usual insurance on the machinery installed in the ship was maintained during the period of delay; but if so, its expense is a just claim. The bureaus are of the opinion that the contract requires insurance to be maintained on the trial trip, and therefore the claim should not be allowed.

" '(5) The performance of a large and special contract *for* this nature causes any contractor a large increase in general ex-
105 pense by the maintenance of an extra office force of clerks and draftsmen, experts, foremen, and superintendents of labor, and the claimants are justly entitled to recover for such part of this force as it was necessary to maintain during the period of delay caused by the Government.

"'Undoubtedly the best method of settling the amounts due the contractors on those several grounds would be to refer the case to the Court of Claims, where they can be thoroughly and carefully determined, as recommended by the Department in its letter of December 8, 1893; but as such a long time has elapsed already since the contractors were justly entitled to compensation, the bureaus are of the opinion that a definite recommendation should be made to enable the Department and Congress to act without the delay and expense to both parties in the case which would be further incurred by reference to the court.

"'*Recommendation of Amounts Due Claimants.*

"'1. Interest. The claim for interest begins to accrue on October 3, 1892, the date of expiration of the contract, which it appears the contractors could have fulfilled but for faults of the Government. The contractors ask for interest at 6 per cent on all amounts then to be paid, viz:

"'Nine reservations on previous payments	$66,150
"'And the last payment	73,500
	139,650

"'Under the schedules of just claims given above, however, interest can not be allowed on the last payment, for the work it was to pay for had not been wholly, nor probably largely, performed, as the record shows.

"'Interest on this payment should not be allowed to begin to accrue until it was earned and unpaid. * * *

"'Total, $63,220.59.

"'To which should be added any cost for insurance incurred from October 3, 1892, to November 1, 1894, except that for the trial trip.

"'This is considered a fair award.'

"The Department concurs in the views of the bureaus and approves the statement made by them of the amount to which said company is entitled on account of the matters set forth."

Mr. FAY: Now, I offer that report, No. 118, in evidence, and ask that it be marked an exhibit in the case.

Mr. COLLINS: Objected to as immaterial.

(The same is marked "Claimant's Exhibit No. 8" and accompanies this deposition herewith.)

Question. Now in accordance with that report what action did Congress take on it?

Mr. COLLINS: Objected to as immaterial and not the best evidence.

Question. I hand you an official copy of the law approved March 11, 1904, appropriating the exact amount recommended by the Bureau chiefs and the Secretary of the Navy in full of their claim for damages and losses incurred in the construction of the armored cruiser Maine.

106 Mr. COLLINS: Objected to as irrelevant and immaterial.

(Counsel for claimants offers said paper in evidence, which is marked "Claimant's Exhibit No. 9," and accompanies this deposition herewith.)

Question. Have you examined the contract with the Quintard Iron Works or with Palmer & Co., whichever it was, as to whether this paragraph 6 is contained in it in identical language?

Answer. It is.

Mr. COLLINS: Objected to as immaterial and not the best evidence, the other paper speaking for itself as to its contents.

Question. And where is it found?

Answer. A copy of the contract was sent by the Secretary of the Navy to Congress in his report dated December 8, 1896, and is contained in House of Representatives Document No. 68, Fifty-fourth Congress, second session, pages 9-14, of claimant's exhibit No. 7.

Question. During your presentation of this case of the Massachusetts to the Navy Department, or the other vessel that you refer to, or the Indiana, was it ever suggested by any officer of the Department examining them, or the Secretary, that the final receipt, which had been given in the case, was a bar to the claim of the character that you were presenting?

Mr. COLLINS: Objected to as leading, suggestive, argumentative, and as an attempt to parole to vary the terms of or interpret the terms of a contract in writing after the contract had been executed, and after the same has been passed upon by the highest court.

Answer. I never heard of any such objection. There never was any reference by the Judge-Advocate-General in my interviews with him and the Construction Bureau as to the final receipt having anything to do with these claims.

Question. Did you have a number of interviews with both the construction department and the judge-advocate of the law department?

Mr. COLLINS: Objected to for the same reason.

Answer. I had several interviews. The objection of the Construction Bureau and Judge-Advocate-General was solely to the amount which they claimed the Cramps wanted paid was excessive.

Question. What particular officer of the Construction Bureau had particular charge of them?

Answer. Chief Naval-Constructor Hichborn.

Question. Did Hichborn ever make any report to Congress on any of the cases?

Mr. COLLINS: Objected to as leading and suggestive and as not the best evidence.

Answer. He made a report to Congress on the Indiana case.

Question. Have you a printed copy of that report?

Answer. I have.

Mr. FAY: I offer that report in evidence.

(The same is marked "Claimant's Exhibit No. 10" and accompanies this deposition herewith.)

Mr. FAY: I offer in evidence the specifications for the Indiana and the Massachusetts and will produce them in court at the hearing.

Mr. COLLINS: Government's counsel reserves the right to cross-examine Mr. Creecy in the future, should this be deemed necessary.

107 In answer to the final interrogatory by the Commissioner, the witness says that nothing further occurs to him at the present time material to the claim in controversy.

CHARLES EATON CREECY.

Sworn to and subscribed before me this 30th day of September, 1907.

ROB'T L. MILLER,
Commissioner.

Deposition of Hilary A. Herbert, for Claimant, Taken at Washington, D. C., on the 7th Day of October, A. D. 1907.

Claimant's counsel, Messrs. John C. Fay and C. E. Creecy; defendants' counsel, F. W. Collins, Esq.

HILARY A. HERBERT, being produced as a witness on behalf of the claimant, and by me duly sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the above-entitled cause, was examined and testified as follows:

Direct examination by Mr. FAY:

Question. You were Secretary of the Navy during the second Administration of Grover Cleveland?

Answer. Yes.

Question. As such Secretary did it become a part of your duty to carry out the contract between the United States and the claimants for the building of the battle ship Massachusetts?

Answer. Yes.

Question. Do you remember how far the vessel had progressed in its building when you assumed your office?

Answer. It was about ready for launching, I think, prior to my assuming office.

Question. Was the vessel completed and delivered under your administration as Secretary of the Navy?

Answer. It was.

Question. Did it fulfill the contract requirements?

Answer. It did, I think.

Question. At the time you took your office had the character of the armor which the United States had agreed to furnish been definitely determined by the United States?

Answer. It had not. There were changes made afterwards in the plans that existed when I went into office.

Question. Do you remember what particular process it was subsequently put through?

Answer. The original plans provided for simply steel armor, tempered in a certain way, I think, according to the plans of the Creusot company, of France, and after that time Mr. Tracy decided to put in nickel-steel armor, and after I became Secretary it was decided to submit the armor to what is called "the Harvey process," a new process which was experimented with for some time before a decision was reached. The experiments took place, according to my recollection, at the Washington Navy-Yard, under command of Commander Folger.

108 Question. By whom was it finally determined to harveyize the armor?

Answer. By myself.

Question. Can you fix about the time?

Answer. It was pretty early in my administration. There is some memorandum here which I would like to have reference to.

Question. Look at page 90 of claimant's Exhibit No. 5, being your report to Congress of December 8, 1896, and see if that refreshes your recollection?

Answer (after examining the same). Yes, it is August 25, 1893, that I wrote the letter. I stated from my independent recollection, it was early in my administration, August 25, 1893, and I had come into office shortly after the 4th of March, 1893.

Question. When you made that change were you aware that by applying the Harvey process to the armor it would delay the completion of the vessel for a long period of time?

Mr. COLLINS: Objected to as leading and suggestive.

Answer. Yes, at that time I knew that the adoption of the new process for the completion of the vessel would necessarily delay it, because it would take some time to apply that process to the armor after it had been shaped, but I did not think when I first adopted it that the delays would be as great as they were, as they subsequently proved to be. After the process was applied to the armor it was found difficult, in fact, almost impossible, if not quite, to drill the holes in the armor with the tools they then had, because the armor was so hard, and its resistance was so great, and a new process had to be invented, and my recollection is it was invented at the Cramp shipyards, annealing these plates at points where they were to be perforated, and even after they were perforated it took some time. These delays were quite considerable.

Question. Were you also aware that such delays would enhance the cost of the building and entail upon them loss and damage?

Mr. COLLINS: Objected to as leading, suggestive, and argumentative.

Answer. That matter was brought to my attention by the Cramp company, and I of course recognized that fact that the delays would increase the cost, because the matter was presented to me in such a way that I could not fail to see it. It would delay payments, it would render necessary increased cost of care, docking, etc. These things were pointed out to me and I recognized them.

Question. How about insurance?

Mr. COLLINS: Objected to as leading and suggestive.

Answer. It would cost increased insurance.

Question. Did you expect the builder would be compensated for such loss and damage; and if so, how were they to be compensated?

Mr. COLLINS: Government's counsel objects to the question as incompetent and inadmissible under the rules of evidence, this being an effort to vary, interpret or explain the terms of a written instrument which has been executed and which has been already passed upon by the courts, and as also calling for the opinion and conclusion of the witness.

Answer. As I looked upon the matter this increased cost to the builder would give him a claim against the Government, but it would be a claim for a breach of contract, and I did not think the
109 Navy Department had power to adjust it, and therefore in my opinion it was like any other claim that a contractor with the Navy Department would have against the Government; therefore the consideration of such claim, as a party might have, would be remitted either to a court or to Congress, and my recollection is from looking over the correspondence that I had at that time with the Cramps, as well as also from my independent memory, my then opinion was that it was doubtful whether the Court of Claims would have jurisdiction, or whether the claimant would have to go to Congress, but I did not consider that matter carefully, because it was not for me to determine it, after I had decided that the Department did not have jurisdiction.

Mr. COLLINS: Government's counsel moves to strike the answer of the witness from the record, for the reasons stated in the objection to the question hitherto.

The WITNESS: I want to add that I really gave no especial consideration as to the form of the remedy at that time, but I did decide that I did not have jurisdiction.

Mr. COLLINS: I make the same motion.

Question. In your opinion did the public interests demand the subsituation of harveyized armor for the ordinary armor, notwithstanding the individual losses that the Cramp company might sustain?

Answer. It did. In fact, this appears in a letter which I wrote to the company on that subject. I thought and decided that the Government ought to adopt the Harvey process, because it would secure the best armor then known, and that the Government was entitled to that in the ships that it was building and ought to have it without regard to the cost either to the Government or to the shipbuilder.

Question. Did the result that the harveyizing of the armor vindicate your judgment as to its superiority?

Answer. So far as all the tests that had been applied indicate, it did.

Question. And by this process the United States got a much more invulnerable vessel than it otherwise would have?

Mr. COLLINS: Objected to as leading and suggestive.

Question. Had the question of your power as Secretary to settle and entertain such claims sued on ever been distinctly passed on by you?

Answer. It was as indicated in my letter of June 10, 1905, to the Quintard Iron Company. In that case N. F. Palmer & Co., representing the Quintard Iron Works, had written to me, presenting a claim for reimbursement for delays that had occurred to them in the building of the machinery for the Maine, by reason of the failure of the Government to furnish armor when the company was ready to install it, and I then stated, "I have to state that your claim for reimbursement of this amount is in the same category with your claim for the payment of other expenses incurred and losses sustained by reason of the delay in the completion of the hull of said vessel, and which, for reasons explained to you heretofore, the Department had no authority to settle."

Question. That letter is found in what document?

Answer. That is an exhibit to a letter that was transmitted by me on December 8, 1896, to the Congress and printed as House Document 68, Fifty-fourth Congress, second session, and it is on
110 page 63 of that document. That letter is written in reply to a letter from Mr. Palmer.

Question. Give the date of that letter?

Answer. The letter to which that was a reply was addressed to Captain Lemly, Judge-Advocate-General, on June 7, on page 68 of that same document, and in the letter of June 10, before quoted. I was replying as Secretary to the letter that had been written to Lemly as Judge-Advocate-General.

Mr. COLLINS: Government's counsel objects to the question and answer of the witness as referring to a matter that is outside of and immaterial to the case at bar, and which is not shown to be connected with this case, or the contract in suit, or identical therewith.

Mr. FAY: I offer in evidence that document No. 68, Fifty-fourth Congress, second session, and ask the Commissioner to mark it "H. A. H. No. 1."

Mr. COLLINS: Objected to as immaterial and irrelevant.

Question. What has been the previous rulings of the Department on this question as to the right of the Department to settle this class of claims?

Mr. COLLINS: Objected to as not the best evidence.

Answer. I think my ruling at that time was in accordance with previous rulings.

Mr. COLLINS: I move to strike out the answer for the same reason.

Question. Now, I show you on pages 493 and 494 the final receipt or release of the Cramp company in the Massachusetts case, printed

on pages 493 and 494 of the record, and ask by whom and under whose direction was that paper prepared?

Answer. It was prepared by the Judge-Advocate-General under me.

Question. Under your direction?

Answer. Yes.

Question. Now, at the time of its execution was there pending before you the claim embraced in this suit under the act of June 10, 1896?

Answer. Yes. That I find here in this House Document No. 69, Fifty-fourth Congress, second session. This is a letter from Cramp & Co., dated September 30, 1896, presenting to the Department a claim of the Cramp Ship Building Company for losses and damages due to the failure of the Government to deliver the armor and armament of the Massachusetts within the time and in the order necessary to carry on the work properly.

Question. That was presented to the Department September 30, 1896?

Answer. Yes; that is the date of it, and it was presented about that time.

Question. And the date of that final receipt is November 26, 1896?

Answer. Yes.

Question. At the time you took that final receipt, in which is embraced this language, "all claims of any kind or description by virtue of said contract," I would inquire whether you intended to secure a release of the claims presented and pending before you under the act of June 10, 1896, which had been presented to you September 30, 1896?

111 Mr. COLLINS: Objected to for the reason that it is an attempt to vary, explain, and interpret a contract in writing long after said contract has been executed and passed on by the highest court and as incompetent and inadmissible under the rules of evidence, and as further calling for the opinion of this witness with relation to these matters.

Answer. In reply I stated that it could not have been my opinion at that time that that was a release of all claims, and I am fortified in that statement by these facts. On the 1st of February, 1893, I made a contract with the Cramp company whereby I advanced them a payment of $150,000, part of the reserved payment for the Massachusetts, and as specifically stated in that contract I required the Cramp company to release the United States from all claims for damage or losses sustained by it on account of any delay theretofore occasioned by the action of the United States in the construction of the ship, and in my subsequent letter and report of December 8, 1896, which was after the November final receipt had been taken, and which letter was in compliance with an act of Congress requiring me, as Secretary, to examine claims which had been presented to me by the Cramp company for damages of that character of certain ships, including the Massachusetts, and report thereon, I took occasion to call the attention of Congress to the "provisions of the

memoranda of agreements made with the contractors in modification of the contracts for the construction of the Indiana and the Massachusetts, dated respectively May 10, 1894, and February 1, 1895, copies of which were inserted in the statements of claims herewith, on account of those vessels, wherein the contractors expressly released the Government from all and every claim for loss or damage theretofore sustained by them by reason of any failure on the part of the Department to comply with the terms of said contracts or on account of any delay theretofore occasioned by the action of the Government." In that letter to Congress I stated in reference to the claims of Cramp & Co. that I was speaking of, which included the claim of the Massachusetts, as follows:

"And in my judgment the interests of justice demand that they should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted by the committees of the two Houses of Congress."

I called the attention of Congress to these specific releases, because, in my opinion, the Congress ought to have before it the fact that the specific release had been given before determining whether or not it should, as I recommended, refer these claims to the Court of Claims. If I had also thought that the final receipt was in itself intended to cover all claims for damages on account of delay in the construction of these vessels, I would also have called attention to that receipt. For these reasons I feel confident that in that letter I ignored the final receipt, because I did not think it was like the releases to which I called specific attention and not a final release of all damages that had heretofore accrued.

Mr. COLLINS: Government's counsel moves to strike out the answer of the witness for the reasons stated in the objections to the question.

112 Question. After the release, or final release and receipt, as you call it, of November 26, 1896, did you proceed to investigate and examine the claims submitted under the act of June 10, 1896, and report the same to Congress?

Mr. COLLINS: Objected to as leading.

Answer. I did.

Question. Look at the paper I hand you, being document 69, Fifty-fourth Congress, second session, and being Claimant's Exhibit No. 5, and state whether that is the report that you then made.

Answer (after examining paper). Yes, sir; as shown by the report to which you refer, and I have already found it necessary to allude to that report in answering the previous question.

Question. If it had been your intention to have the final receipt of November 26, 1896, cover the claims in suit, would you have reported the fact of such final receipt in your report to Congress of December 8, 1896?

Mr. COLLINS: Objected to for the same reasons as stated above, and because it is hypothetical and calls for the opinion of the witness as to what he would have done.

Answer. I think I have already answered that, and refer to my previous answer.

Question. Now, I want to call your attention to the language of the receipt of the 23d of November, 1896, which is as follows: "William Cramp & Son Ship and Engine Building Co., represented by me, Charles H. Cramp, a corporation, does hereby for itself and its successors and assigns and legal representatives, remise, release, and forever discharge the United States of and from all manner of debts due, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of the construction of the said vessel under the contract aforesaid," and also the language of the special releases of the Massachusetts, dated February 1, 1896, and also the one dated October 5, 1894, the language of which is as follows: "That in consideration of said payment the party of the first part hereby releases the party of the second part from all and every claim for loss and damage hitherto sustained, by reason of any failure on the part of the party of the second part to comply with the contract aforesaid, or on account of any delay hitherto occasioned by the action of the party of the second part," and ask you whether both of those forms were prepared under your direction?

Answer. They both were.

Question. Did you intend that both these forms should release the identical claims?

Mr. COLLINS: Objected to for the reasons stated above as incompetent and inadmissible under the rules of evidence and as further calling for the opinion of the witness.

Answer. The first of those specific releases for damages was prepared under my specific directions. Mr. Cramp had applied to me for the advance of some reserve payments on the ground that he was in great need of money; that his financial conditions were such at the time that it was impossible for him to raise it elsewhere, and he insisted that under the circumstances I ought to pay him. My independent memory of that particular transaction is quite distinct, because he argued the question at considerable length and with great force. I told him that I sympathized with his condition and
113 was willing to advance him the money, but did not feel that I had the right as an executive officer to modify the previous contract made with him without some new consideration, and that if he would not only give me a bond for the refunding, if necessary, but release all claim for damages that might accrue to him before that time on account of his claim that the Government had delayed him in the completion of the contract, I would advance him the money; I was particular to see that the contract when it was drawn up was broad enough to cover that point without any doubt. As to the final receipt, while I have stated that that was prepared under my direction, I only mean to say that it was in that general way that contracts were prepared, and I undoubtedly read it when the receipt was signed, but I do not think I could have considered that that ap-

plied to anything more than a general release of things that he was to do under the contract.

Question. As I understand you, if you had intended that it should apply to the same class of claims that the release of February, 1896, and November, 1894, had applied to, you would have seen to it that the language would embrace them?

Mr. COLLINS: Objected to for the reasons as above, and because it is leading, suggestive, argumentative, and hypothetical.

Answer. If my intention had been to make it an absolute release of the damages for that specific cause I should have required the language to be used more nearly like that used in the first releases than the language which is used in that final receipt.

Mr. COLLINS: Government's counsel moves to strike out the answer for the reasons above.

Question. I observe that in your report to Congress of December 8, 1896, before you, you state that the claimants contended that these special releases were obtained by duress.

Mr. COLLINS: Objected to for the same reasons stated above.

Answer. Yes, I did say that "It will be observed that the contractors claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress," on page 2 of House Document No. 69.

Question. When did the claimants advise you that that was their contention, or about when did they so contend?

Mr. COLLINS: Objected to for the same reasons stated above.

Answer. I think that contention was made practically all along. While this question was being discussed Mr. Cramp insisted that I should not take advantage of his circumstances in that way, and my reply to him was that if he did not want to make that agreement I did not feel at liberty to advance the money, and there left the matter for him to decide.

Question. Did he not remonstrate and protest against being required to sign a release?

Mr. COLLINS: Objected to as leading, suggestive, and for the reasons given above.

Answer. I have already stated that he insisted that I ought not to require the release as condition of the payment, and I thought I should, because I could not advance him the money without some legal consideration.

Question. In his conversations with you were his remonstrances vigorous or otherwise?

114 Answer. Very emphatic. Mr. Cramp was a pretty emphatic man, and at that time he was especially so.

Question. Did he or not tell you of the financial condition of his company, and what results were likely to follow if he did not get the money?

Mr. COLLINS: Objected to as leading, suggestive, and immaterial,

and also for the reasons given above; and as already having inquired about.

Answer. He stated that he could not carry on the business unless he could get money, and that he was not able to get it elsewhere.

Question. Did or not Mr. Cramp contend that the money was due him, and but for the defaults of the Government it would long since have been paid?

Mr. COLLINS: Objected to as leading, suggestive, and for the reasons given above.

Answer. He did insist that it was by reason of the default of the Government that the ship had not been completed before it was, and that if the Government had delivered him the armor at the time he was ready for it he would have had the ship finished before that time.

Question. Had the money been earned at that time?

Answer. Yes, sir; it had been earned, but according to the contract it was not due. The contract required that 10 per cent of the moneys that had been earned should be reserved and set aside from each payment, and should not be due until the acceptance of the vessel.

Question. Did you offer him any alternative other than the release of the claim and the giving of this bond?

Mr. COLLINS: Objected to for the same reasons as above.

Answer. I do not remember that I did. He applied for the money and I told him he could have it under those conditions. It was not strictly due and payable at that time, but I concluded to advance it to him if he would give me the release.

Question. You did not offer him any other alternative?

Answer. I think not.

Question. Do you remember any similar claims by other parties that came before you during your administration?

Mr. COLLINS: Objected to as immaterial.

Answer. Yes; there was a claim of the Richmond Locomotive Works for delays in the construction of the machinery of the Texas, and the claim of Palmer & Co. for delays in the construction of the machinery for the Maine.

Question. In which similar final receipts had been given?

Mr. COLLINS: Objected to as leading and suggestive, the receipts themselves being the best evidence.

Answer. I think there had been.

Question. What official action did you take with respect to the Palmer & Co. case?

Mr. COLLINS: Objected to as immaterial.

Answer. Referring to House Document No. 68, Fifty-fourth Congress, second session, which relates to the claim made by the Quintard Iron Works (N. F. Palmer & Co.) for the construction of the machinery for the Maine, I see that on December 8, 1896, in mak-

ing returns to the act of Congress that directed me to examine claims against the Government that might be presented for delay
115 in the construction of vessels, and having special reference to the claim of the Quintard Iron Works on account of the Maine, I stated that I had "examined the nature of the claim and the circumstances under which it arose, and, while not attempting to pass on the merits of the same, or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that the same was in some measure, at least, due to delay on the part of the Government, as stated by the contractors, in completing the hull of the Maine, and in my judgment the interests of justice required that this case should be referred to the Court of Claims, which would consider this matter with more deliberation and care than could be devoted to it by the committee of the two Houses of Congress."

Question. What is the document that you read from?

Answer. I have stated that it was House Document No. 69.

Question. That document represents your official action with respect to the Quintard Iron Company's case?

Mr. COLLINS: Objected to for the reasons given as above.

Answer. Yes, sir.

Question. Now, with respect to the Richmond Locomotive Works?

Mr. COLLINS: Objected to as immaterial and for the reasons given above.

Question. Look at the document I hand you [handing witness a pamphlet], and state whether or not that states your official action with respect to that case?

Answer (after examining same). That document is Report No. 60.

Question. What Congress?

Answer. Fifty-fifth Congress, second session, made from the Committee on Claims by Mr. Yost, and in the appendix to that it appears that a bill for the relief of that company was referred to me, and that in letter of February 27, 1895, I stated as follows:

"The Department is not prepared at this time to make a statement as to what amount said company should be allowed on account of the delay in the completion of the hull of the Texas, and inasmuch as the bill provides that such amounts should be determined hereafter, I perceived no objection to the legislation proposed."

Then an act was passed after the transmittal of that letter to Congress authorizing the Department to adjust that claim, which adjustment was done by the Department, Assistant Secretary McAdoo acting as Secretary, and transmitting the claim to Congress in his report to Congress of December 20, 1895, in which the Department recommended the payment of $80,049.35.

By Mr. COLLINS:

Question. You are not furnishing this information from your

independent recollection, but from the data or document which you hold in your hand. Is that right?

Answer. I have a general recollection of these transactions which is refreshed by reading this document. I would not have been able, without reading these documents, to give any of the particulars.

Mr. FAY: I now offer that document No. 60 in evidence.

(The same is marked "Exhibit H. A. H. No. 2" and accompanies this deposition herewith.)

Mr. COLLINS: Objected to as irrelevant and immaterial.

116 Cross-examination by Mr. COLLINS:

Question. You have no interest, direct or indirect, in the result of this suit or these suits, have you?

Answer. I have an interest in this way, whether you call it direct or indirect. Last spring Mr. Creecy, as attorney for the company, came to me and asked me to give him my recollection of what the action of the Department has been and what my action had been in these cases, and he stated in that conversation that he would not ask me to go over all these documents and spend my time without compensation; that what he wanted at that time was to have me write a letter to Congress telling that body what had been my action and what had been the action of the Administration. After I had looked over the thing my recollection of my action was what he supposed it would be. I agreed that for compensation I would do that, and at that time he did not think anything about—certainly I did not think about—my being examined as a witness, but Mr. Creecy's purpose was to get me to write a letter to Congress in the Indiana case, but it was a general interest in these claims that were expected to go before Congress. I have stated that he had no intention, at least he did not so state, of examining me as a witness, and he did not until after I told him what my recollection was.

Question. Have you now any interest in the result of this litigation?

Answer. I suppose I have in the general result.

Question. That is, you have a contingent fee, have you?

Answer. Yes, sir; a small one.

Question. Now it was the purpose, was it not, of the Navy Department in drawing these contracts, and of yours in drawing the releases to the contracts, to protect the interests of the United States in every way possible, so far as the same related to claims for damages which might increase the cost of the vessel in question; is not that correct?

Answer. It was, so far as those provisions were concerned. These general contracts, the forms in which the contracts were prepared had all been settled upon before I became Secretary of the Navy. I am not aware that any real change was made in the forms of the contracts after I went in. The contracts were always drawn in the Judge-Advocate-General's Department and submitted to me; my understanding was that they were approved forms that had been used theretofore. When I took these specific releases the subject of dam-

ages was first acted upon by me. The specific question of protecting the Government against claims for damages was not acted upon by me in any way that I know of, except when I took those two or three special releases. They were taken at the time that I advanced the money and were intended to guard against claims for damages that had theretofore accrued.

Question. What kind of damages?

Answer. Damages for delays in the construction of these vessels by reason of the Government's failure to furnish the armor within the time and to comply generally with the terms of the contract.

Question. Then if I understand you correctly, at the time you took those special releases you had particularly in mind the default of the United States Government in furnishing armor to the contractors?

117 Answer. Yes.

Question. And you did not feel that you could vary the terms of the contract itself and furnish this money or advance this money so that you felt it incumbent upon you to have a new consideration?

Answer. Yes, sir.

Question. Upon which you would advance this money?

Answer. Yes.

Question. And for that reason you made these releases in the form you did?

Answer. That is correct.

Question. And they came particularly under your notice?

Answer. They did.

Question. These later releases were not prepared that way by you or under your particular eye?

Answer. No.

Question. They were prepared by the Judge-Advocate-General without consulting you in the premises, but finally submitted to you for your inspection and approval?

Answer. Yes.

Question. Did you notice when the final release was drawn up, the particular verbiage contained therein?

Answer. I can not say I did.

Question. You have no present recollection of noticing the particular verbiage of those?

Answer. No; my recollection is that I read them as I usually read those papers, and what I have already stated, that it did not make any impression on my mind that they were releasing these damages particularly. That is my present recollection of it. I do not remember that my attention was called to it.

Question. Have you any present recollection with reference to the impression made upon your mind with relation to the matter of suits for damages, or claims for damages, on account of the failure of the United States to deliver armor to the claimant company when called for?

Answer. No present recollection, except that gathered from my action in the case, as I have already stated, that I did not call at-

tention of the Congress to these final receipts as I did to the specific releases. That is the only recollection I have.

Question. Now, with relation to the letter of December 8, 1896, in which you called the attention of Congress to these claims, did you prepare that letter yourself or was it prepared by others for you?

Answer. I do not remember that I wrote it out myself, but I think the probabilities are that I dictated the verbiage. I think I did. That is my general recollection.

Question. You are not certain about that?

Answer. No; I am not certain whether the Judge-Advocate-General wrote it or whether I wrote it or whether he wrote it under my direction; but I remember I was particular to have it worded so that the release would be specific and so that no two constructions could be placed upon it.

Question. Have you such independent recollection at this time of the circumstances under which you wrote that letter to Congress, that you could state with any degree of certainty that you
118 yourself prepared that letter? I am referring now to the letter of December 8, 1896.

Mr. FAY: That is the report?

Mr. COLLINS: Yes, it is a report. I will change that to report.

Answer. That report, in which those words were used, I remember I paid particular attention to it, but I can not say whether I wrote the words or dictated them. Probably I did not write them with my own hand, but I certainly paid particular attention to the substance of those words and the words themselves. I paid particular attention to it because this was one of the very important matters that occurred.

Question. What words now are you referring to?

Answer. The whole of that, the report, stating that my——

Question (Interposing). Do you mean the paragraph relating to the Indiana and Massachusetts?

The WITNESS: Which are you talking about now? You are talking about the paragraph I just now read.

Mr. COLLINS: I am asking you if you are referring to the paragraph relating to the Indiana and Massachusetts in which you invite particular attention to the memoranda of agreements relating thereto.

Answer. Yes.

Question. That is the clause you are particularly referring to?

Answer. That is the clause, and that is the one I say my attention was particularly drawn to, and I considered it very carefully. My reason for stating that that act required me to state whether I thought the Department ought to decide on these questions or whether Congress ought to decide on those questions, I stated that I thought the interest of justice required that the Court of Claims should pass on them because the court had the machinery. These were the reasons I gave. I remember them very well, and considered them fully, that the court had the machinery that would enable it to do justice to both parties; that it had its attorneys and could call before it witnesses and cross-examine them and get at the bot-

tom facts in a way that the Department would not be able to do, and for that reason I thought it would be better to refer it to the Court of Claims.

Question. Now, is it not a fact that the reason that you did not refer to the final release in the report which you made to Congress was that you labored under the impression at that time that the release of February 1, 1896—I am referring now particularly to the Massachusetts—covered the matter entirely, and that if Congress passed on that form of release adversely to the claimants' interests that then they would be precluded from recovery?

Answer. No; I did not think that, because that release was worded only so as to cover damages that had accrued up to the time of the giving of the receipt, and it did not undertake to cover the damages that might accrue after that time.

Question. The space of time intervening between the date of that receipt and the date of the final release of the vessel was in the neighborhood of about ten months, was it not?

Answer. I believe it was.

Question. Now, are you certain you had anything in mind with relation to that interval of ten months at the time that this report went to Congress?

Answer. Yes, I am certain that I knew that that release did not apply to any damages thereafter accruing. My recollection
119 of that was particularly distinct, because of the emphasis with which Mr. Cramp talked to me about what he said was the injustice of those releases, and we had quite a long talk on it, and I will state that the idea was mine, not suggested to me by the Judge-Advocate-General or anybody else in the Department, of requiring this new consideration, because I knew he was making the claim, and I said "if you release that up to this time"—I remember that more distinctly than anything else about the whole transaction.

Question. At the time that you demanded that sort of release from the Cramp Company did you not have in mind that you were dealing with them in a spirit of injustice or unfairness, did you?

Answer. I did not think so.

Question. Otherwise, you would not have exacted such a release from them?

Answer. I told him, "It may be hard on you, but you can take it or not, just as you please."

Question. You made it optional?

Answer. I made it optional.

Question. If he had these advance payments before the contract time called for them to be made, then you expected him to sign this release?

Answer. Yes.

Question. But you told him it was for him to decide whether he signed them or not?

Answer. If he wanted the money I would pay it on that condition, not otherwise.

Question. You did that, because you thought under your inter-

pretation of the contract in connection with the duties of your office that any other methods would have been improper. That is true, is it not.

Answer. I thought that was all I could afford to do for him, and as a more definite answer to your question I will say that no other way occurred to me.

Question. You have spoken with regard to some experiments which were being conducted at the navy-yard upon armor plate. As a matter of fact, during the construction of the vessel in question, the armor plate was in its infancy in this country, was it not?

Answer. Yes.

Question. And the Navy Department in drawing these contracts, and the contractor in signing these contracts, must have taken that into consideration. Do you not think that is a fair inference?

Answer. They knew that a plant for the construction of armor had been established at the Bethlehem Iron Works for four years before I went in—more than that—by Secretary Whitney—and Mr. Tracy had established also another plant, because the Bethlehem plant was getting along slowly; he had established another plant at Carnegie's works at Homestead. The Bethlehem plant had been established, my recollection is, before the contract for the Massachusetts had been made, and I think the Carnegie plant was established after the contract for the Massachusetts was made, but I am not certain about that. The Department records will show. Of course, these parties all knew what these conditions were.

120 Question. Was it not your idea as Secretary of the Navy that the contract was intended to provide against all of the contingencies that might arise in connection with the construction of the vessel in question, including possible delays both in the construction of the vessel on the part of the contractor and delays that might be attributable to the Government also?

Answer. There was a provision in that contract, in all these contracts, fixing penalties on the contractors for failure for any delay beyond the contract time in the completion of the vessel, and it was provided in reference to such delays by the contracts that the Secretary might have power, on a proper case being made, to relieve against these penalties. There was no provision of anything of the kind, according to my recollection in the contract applying to any breach of contract that the Government might make.

Question. Do you know why such provision was not incorporated in the contract?

Mr. FAY: Question objected to because the contract was not made by Mr. Herbert. It was made before he came into office.

Mr. COLLINS: I asked him if he knows why it was not incorporated in the contract.

Answer. I do not know why such provision is not made, except to say this, that it is not usual in a Government contract to contemplate any breach of the contract by the Government. But in a contract of that kind where time is important, it is usual to impose penalties, but the Government does not contemplate in the beginning that it is going to fail to comply with its contract.

Question. But both parties knew, did they not, that there was likely to be more or less delay to the armor plate and the fact that it was in a formative state—that is, the preparation of armor plate?

Answer. Yes; both parties knew that was a new enterprise in this country, and that there might possibly be delays.

Question. Do you know whether or not the claimant company in this case had knowledge of that fact at the time they entered into the contract in suit?

Answer. I do not know of my own knowledge, but I should presume that the shipbuilding company would keep itself informed about the condition of armor plate.

Question. Were you familiar with the language of this contract, which relates to an extension of the same, in case of the default of the Government in the delivery of armor plate or anything on its part?

Answer. Yes; I was familiar with it. I had not looked at that specificially, but I have a distinct recollection of it, because I acted under it several times. I was called upon to release penalties. Sometimes I did, and sometimes I did not. Sometimes the Congress relieved against penalties that I did not relieve against.

Question. You have undertaken to furnish what was in your mind, or rather, perhaps, what was not in your mind, at the time that the final release was given with relation to the scope of the same. Are you willing to say that under that contract it was not contemplated that when the final release should be given by the claimant company upon the ship in question and accepted by the United States, that it was not intended and contemplated that that should cover any
121 and all claims growing out of the construction of the ship in question, including claims for delay? In other words, that when the final release in question should be given that it was not intended that that should settle all matters between the claimant company and the United States with respect to the ship in question?

Answer, I have read the opinion of the Court of Claims which decided that that final release that was contemplated did not mean that, and I have read the opinion of the Supreme Court which decides that that final receipt contemplated by the contract did mean that, and I would not like to give an opinion as to whether the Supreme Court was right or the Court of Claims.

Question. I am asking your opinion as a Secretary of the Navy or a former Secretary of the Navy, if you can at this time place yourself back in that position.

Answer. At the time the original form of the contract was made before my administration?

Question. At the time you were acting under that contract, so far as the same came under your observation?

Answer. I want to say, as I have said before, that the contract itself was a form that had been approved by previous Secretaries and was followed by me. So that, if there was any deviation in it I do not remember, and did not at that time. These contracts were elaborate, and they were brought to me and had to be signed, and I looked them over and signed them. But I will say this: If in preparing that contract originally it was the intention of the Secretary who prepared it that the final payment should never be made unless

the contractor should release all damages for any breach of the contract that the Government had been previously guilty of, no matter how gross, that that would be an injustice that ought not to have gone into a Government contract. I do not want to give an opinion between the decision of the Supreme Court and the opinion of the Court of Claims.

Mr. COLLINS: In my judgment this testimony from start to finish is not admissible under the rules of evidence, but in view of the fact that you have been examined at length on the direct examination, and only for that reason, am I asking you these questions, and I am asking you, if possible, to place yourself in the position and attitude of an official of the United States Government charged with the duty of representing the Government's interest in connection with a contract of this sort, as to what the contract in suit under such administration by you might reasonably be intended to cover and include.

Answer. As I have stated, if the contract intended to provide that the Government itself might be guilty of gross breaches of the contract and yet be at liberty to withhold payment for work that had been done in accordance with the contract until breaches of the contract had been condoned by the other party, it would be an injustice; but if the contractor simply meant that all minor matters connected with the contract and its performance should be settled by the final receipt, then that would be reasonable.

Question. But you have already stated, as I understand you, that the matter of the furnishing of the armor by reason of the fact that its manufacture was in the formative condition in this country was involved in more or less of doubt. Now in that view, and the
122 contract drawn, as it is, to provide that in case of the Government's default in furnishing the armor in question that the claimant company should be entitled to an extension and no penalties or damage as against the Government mentioned, are you willing to state that in your judgment it was not in the minds of the parties at the time the contract was drawn and executed that such defaults on the part of the Government were not included therein and covered by that provision, which provides for an extension, and extension alone?

Mr. FAY: Question objected to upon the ground that it is not responsive to any direct examination, and it asks the witness for his opinion as to what was in the minds of the parties and not as to any action of his own.

Mr. COLLINS: I will say the question is asked because of the fact that the witness has been asked heretofore to give his opinion with relation to matters which are equally as objectionable in the view of Government's counsel.

Answer. The penalty clause in these contracts for the failure of the contractor to complete the ship within the time specified, and also another penalty clause for the failure of the vessel to make the contract speed, these penalty clauses have nothing whatever to do with any other breaches of contract by the contractor. They are to be

considered by themselves, and there was a provision in the contract which imposed the penalties authorizing the Secretary, when a proper case is made, to release these penalties; but the contract did not go on and undertake to provide specifically for every possible breach of contract by the contractor any more than it did for every possible breach of contract by the Government. The contractor might have been guilty of other breaches of the contract, as for instance, of carelessly allowing the destruction of the vessel, and that was not provided for specifically, but the Government would be left to recover damages in a proper way for it. The contractor is protected by his bond, so that the parties themselves did, of course, have knowledge of the state of the art of the manufacture of armor, and undoubtedly contracted with reference to the circumstances within their knowledge, but the contract itself did not undertake to provide for any remedy on the part of the contractor against the Government. For instance, suppose the Government had absolutely refused to go on with the construction of the vessel and abandoned its plans when the ship was about half built, or four-fifths built. That would be something not provided for in the contract. Then the Government would have all these reserved payments for work already done before that time, and if that clause in the contract was literally construed the contractor could not even get pay for the work he had already done, because the Government had not completed the vessel, although, it was through the default of the Government, which had abandoned its scheme of building the vessel. So that it is perfectly plain, if I must enter into a discussion of the question, that there might be many wrongs done by the Government to the contractor for which the contractor would have to seek his remedy either in the Court of Claims or before Congress, because these defaults were not anticipated or provided for in the contract.

Question. But you are not prepared to say, are you, that this particular default—I mean the delivery of the armor plate by
123 the Government to the contractor—was not in the minds of the parties to this contract at the time they drew the same?

Answer. I do not want to decide that myself. The Supreme Court has decided one way and the Court of Claims another way. You are asking me to say now which is the better opinion.

Question. No. I am asking you about these particular defaults complained of—that is, the failure of the United States to deliver the armor plate when called for by the contractor.

Answer. That is, as I have just stated, a question upon which the two courts differ.

H. A. HERBERT.

Sworn to and subscribed before me this 7th day of October, 1907.

ROB'T L. MILLER,
Commissioner.

Deposition of Philip Hichborn, for Claimant, Taken at Washington, D. C., on the 6th Day of November, A. D. 1907.

Claimant's counsel, Messrs. John C. Fay and C. Eaton Creecy; defendant's counsel, F. W. Collins, Esq.

PHILIP HICHBORN, a witness produced on behalf of the claimant, being first duly sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth touching the matters at issue herein, testified as follows:

That his name is Philip Hichborn; that he is nearly 69 years of age; that his residence is Washington, D. C.; that he is a retired chief constructor of the United States Navy; that he has no interest, direct or indirect, in this claim; and that he is in no degree related to the claimants or either of them.

Direct examination by Mr. FAY:

Question. Please state your services in the construction corps of the Navy.

Answer. I was on active duty in the construction corps for more than thirty years, as assistant constructor, naval constructor, and chief constructor, chief of the Bureau of Construction and Repair, Navy Department. I have been on the retired list as chief constructor about seven years.

Question. What did you have to do, if anything, with the preparation of the contracts for the coast line battle ships Massachusetts, Indiana, and Oregon?

Answer. At that time I was assistant chief of the Bureau. Mr. Wilson was the chief constructor. The contract, or what was called the tentative contract, was prepared in the Judge-Advocate's office. It was the usual custom to send it down to the Bureau for recommendations and suggestions, and the addition of all the technical information required, such as the dimensions of the vessels, the draft of water, and place of delivery, and in coming to the Bureau matters of that kind were passed to my desk. In fact, all matters pertaining to the ships went over my desk before going to the chief constructor for his approval and signature.

Question. Did these contracts for these three vessels follow that course?

124 Answer. They did.

Question. You are familiar, are you not, with the contract entered into between the Cramp company and the Government for the building of the Massachusetts?

Answer. I believe I am.

Question. I find in Article III of this contract the following proviso; after referring to the obligation of the Government to furnish the armor, etc., it proceeds:

"provided, however, and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery engines, boilers and appurtenances, and equip-

ment and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second party (that is, the United States) shall not have commenced the delivery of such armor to the party of the first part (that is, the company), then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side belt, casemate, turrets, redoubts, barbettes, and conning tower shall be fulfilled, the vessel shall be accepted, as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor for the side belt, casemate, turrets, redoubts, barbettes, or conning tower when the vessel is ready for her final trial or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing and securing the armor for the side belt, casemate, turrets, redoubts, barbettes, and conning tower shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such costs shall be deducted from the contract price of the vessel in the final settlement under this contract."

Do you recall that provision in the contract?

Answer. I do, perfectly. That was in the contract when it came to my desk, and it being something new, was the subject of discussion between the chief constructor and myself.

Question. If you know, please state what the object and purpose of that proviso were.

Mr. COLLINS: Government's counsel objects to the question as incompetent, irrelevant, and immaterial, and as an attempt to interpret and explain a written instrument by parole, after said instrument has been fully executed, and after an instrument identical in nature has been passed upon by the highest court, and is therefore wholly inodmissible as evidence, and as not the best of evidence, the contract speaking for itself.

Answer. The proviso was to protect the shipbuilders against loss, in case the Government failed to comply with its part of the contract. It was a well-known fact that the Government had never had any experience in the purchase of armor; that the armor makers at that time had had but little experience in making it. The time of delivery and, in fact, the quality of the armor were considered as to whether they could deliver it on time or in the order required. The shipbuilder, in conversation with me, felt grave doubt whether he would be able to get the armor in order to complete the vessel. He called attention to the construction of the ship and to the way the armor was placed on the vessel, that if he did not get the armor he would be delayed in his work, and it seemed, while the Government was holding him up to penalties, that he was getting no security from the delay that the Government might occa-

sion him. Most of that conversation, or the fact that it was put in, was carried on with the Secretary, and there was more or less discussion in the Secretary's office between the shipbuilders, the men that were going to bid on the contracts in reference to that matter.

Question. Was the purpose of this proviso the subject of discussion and consultation between the officers charged with the preparation of the contract and the Secretary. And if so, state if you remember what their expression was as to its intent and meaning.

Mr. COLLINS: Objected to for the same reasons as above and as entirely ex parte, and suggestive, leading, and immaterial.

Answer. It was a subject of discussion by the Judge-Advocate, the Secretary of the Navy, the chief constructor, and the men who were to bid on the contract, and the object was to protect the shipbuilders against loss in case the Government failed to carry out its part of the contract.

Question. Do you remember whether the Indiana was tendered for trial under the proviso of this article?

Answer. I recollect the time she was offered for trial. At that time I had reached the position of chief constructor. Mr. Wilson, the former chief, had retired on account of sickness, and I had assumed the duties of the Bureau under that commission.

Question. Was the Massachusetts so offered?

Mr. COLLINS: Objected to as leading and suggestive.

Answer. She was.

Question. At the time the Indiana was offered, state whether or not you made an examination of her as to her fitness for trial, either personally or through officers of your corps.

Mr. COLLINS: Objected to as immaterial, the Indiana case having been adjudicated by the highest court.

Answer. I made a personal examination of the ship, and I also was informed through conversation with the superintendent constructor and with the official reports that were made to me every month.

Question. What was her condition with reference to her preparedness for trial?

Mr. COLLINS: Same objection.

Answer. In my opinion she was ready for trial, and it would have been of advantage to the Government to have had as early a trial as possible after she was so reported.

Question. Except the temporary work which had been put upon the Indiana, how did the condition of the Massachusetts compare with the Indiana when the Massachusetts was tendered for trial?

Answer. It was very similar. The difference was very slight as to their condition, and immaterial from a constructor's standpoint—they were so near alike in their completion.

126 Question. At this time, what was the condition of the United States with reference to its ability to take care of and complete these vessels if they had been accepted in their then unfinished condition under the proviso of the third article?

Mr. COLLINS: Objected to as immaterial.

Answer. These two vessels, the Indiana and Massachusetts, according to the contract, were ordered to be delivered after passing out of the hands of the contractor, to the navy-yard, League Island. That question came up about taking the ships over, and it was realized by the Government, and by the Bureau in particular, that the Government was not in a position to take the proper care of these ships. We only had a small wharf at League Island. At the Back channel, as they called it, the water was so shoal the ships could not go in there, and if left out on the water front they would have been subjected to ice and the danger of other vessels running into them, and it was urged by the Bureau that the ships remain at the yards of the contractors. We had no facilities at League Island. It was just a station then for doing any kind of repairs. In fact, the yard was nearly closed. Since that time the yard has been somewhat improved.

Question. I notice in a report that you made to the Senate committee, with respect to the damages or expenses incurred by the Cramp company, you made a recommendation for the payment of wharfage upon the basis of the tons displacement of the vessels. I would inquire why you took as a factor for such a calculation the tons displacement of the Indiana?

Answer. I recollect the report very well, and recollect the circumstance of making that charge according to the displacement. That question had come up in the Bureau on a previous occasion while we were docking a vessel at New York and where we had to pay dockage. In a man-of-war tonnage, as it is understood in the mercantile marine, is almost an unknown quantity. If I see the tonnage of a merchant ship, I can tell something near what kind of a vessel it is. But if I see the net tonnage of the Indiana, if I did not know anything about her, I could not form much idea of what that vessel was. The tonnage law excludes from tonnage, that is, registered tonnage, the machinery, boilers, and space occupied by the crew. The crew on the Indiana was about 500 people, which occupied a large portion of the vessel. As naval architects we never have any reference to registered tonnage. If we go by displacement, we know the weight of the vessels. We may not know the dimensions. We then know what she would weigh if put upon the scales. Now, in that report they claimed payment for the full displacement of the ship, that is, when loaded it was 10,500 tons, I think. I allowed about half of that, because the ship did not have her armor on and I arrived at that by the draft of water, which I could easily do, and tell the displacement.

Question. Up to that time had vessels of this character ever been calculated for net or gross registered tonnage?

Answer. We never made any mention of it at all, and what brought it about was our vessels passing through the Suez Canal. It gave the captains of our ships great trouble about the payment, and the Department ordered that I insert in the Bureau's report the net

tonnage of all men-of-war. That was more for the captains
127 of the ship to use in payment of canal assessments in going through than anything else.

Question. That started then——

Answer (interposing). About the time of the Spanish war, in 1898, I think, or somewhere along there. I want to say in connection with that: You take the naval architects up in the Department to-day to calculate the net tonnage of the Delaware, for instance, one of our largest ships, and there are no two men who will agree as to the net tonnage, and they will apparently follow the law or try to, as they understand it; they will have the law before them.

Cross-examination by Mr. COLLINS:

Question. Do you know on the basis of the Suez Canal rates what was the tonnage of the Massachusetts?

Answer. Let me understand you. As I made it, or as it stands to-day.

Question. As it stands to-day, first?

Answer. I have not paid any attention to it. If I had looked into the chief constructor's report, I could have gotten it. He has it.

Question. You have not got that information at hand?

Answer. I have not got it in my mind.

Question. Do you know what it was as you made it?

Answer. I know it was between 3,000 and 4,000 tons; something like that. I know it was so small it was almost laughable when you are talking about such a large ship as that.

Question. Why should they figure the tonnage in that way and you here in connection with this claim figure it another way? Why should the Suez Canal people figure the tonnage rate as they do on a battle ship of this character, whereas you, in connection with your testimony in this claim, figure it another way? What is the explanation?

Answer. I can not explain that, unless the English Government have large stockholders in that canal and send their ships through it, and other governments constantly do it, and they did not propose to have the rates any higher for themselves if they could possibly help it.

Question. And so make it correspondingly low compared to their government?

Answer. The other governments using it would be very small as compared with the English.

Question. That is pure supposition on your part?

Answer. Yes; you asked me that and I gave you the best of my opinion. That was at the time when this whole subject was thrashed out in the Bureau, and I being the chief the draftsman in making the calculations came to me to ask a great many questions, and I had to ask a great many from the Department to really get down to business and find out what they were driving at.

Question. Then your idea is that the proper way to determine this question is to get at the tonnage displacement of the vessel at the time that the alleged delay period began and continued?

Answer. I should say that is the proper way in case of a man-of-war. In case of a merchant ship, I should go aboard the vessel and read it on the main deck beam. That is, the law requires that it shall be marked on the main deck beam the gross registered and net tonnage.

128 Question. Why do you say it would be fair to take the net tonnage in case of a merchant vessel and take the displacement of a war vessel?

Answer. Of course, in the measurement of a merchant vessel, the law applies to her more properly. She does not carry such a large number of crew, and have all the ship filled up with different appliances that come under the law to be excluded. You see the whole berth deck of a man-of-war is occupied by the officers and crew. Take the Indiana, for instance. The whole berth deck, fore and aft, the whole length of the ship, is occupied by the officers and crew. That would be excluded from the measurements. That does not happen on a merchant ship.

Question. Do you know what proportion of the average merchant vessel is occupied by quarters for crew and such purposes as would weigh in the consideration of the question of gross or net tonnage?

Answer. There are no two vessels that would be alike, because it depends upon the speed of the ship. If the ship is a high-speed ship like the Lusitania, you will find that her net tonnage will go down pretty small on account of such large space being occupied by the boilers, engines, and coal.

Question. Then the law with reference to gross and net tonnage and deductions to be made from gross tonnage for net tonnage would in your judgment not be an entirely just one? Is that the way you wish to be understood?

Answer. I do not know as I could say it was just or not. I know it is considered at the present time among naval architects as to represent almost nothing. You can not tell anything about it unless you know something about the particulars of the ship, whether she is high speed or low speed, and what her crew is, or what she is used for. That is the generally admitted fact by architects, that the law ought to be changed and regulated in some way, so that you could get some idea of the tonnage of the ship when you read it in the papers, or when you hear it spoken of in conversation.

Question. Taking up the question of the readiness of the Indiana, or rather of the Massachusetts, for her trial, what do you personally know about her readiness for a trial?

Answer. From going on board of the ship and making an examination of her, talking with the shipbuilders, and going over the work with my superintendent constructor and assistants. I had a force of men who came directly under me.

Question. When did you go over her, and in what condition did you find her?

Answer. I was in the habit of going over her once a month after I became chief instructor, sometimes a little oftener.

Question. What time do you refer to on which you made the examination of this vessel and determined she was ready for her trial?

Answer. What specific time?

Question. Yes.

Answer. About the fall of the year 1895, I think.

Question. Do you remember——

Mr. FAY: Let him answer the question.

Mr. COLLINS: Pardon me. Had you finished?

The WITNESS: Yes.

129 Question. Now, do you remember particularly a visit which you made to the ship in suit, I mean the Massachusetts, as a result of which visit you determined that she was ready for her trial?

Answer. Do you want me to give the day?

Question. I ask you if you remember a visit which you made to the Massachusetts, as a result of which visit you determined she was ready for her trial trip?

Answer. Yes; I recollect when I found the Department was not going to allow them the trial that I went over to satisfy myself, as I was to be called upon to act in the matter.

Question. It was after the Department had determined not to allow a trial that you examined her?

Answer. I am not sure. I know I was in a position to know that they were going to prevent the trial of that ship, and I want to say at this time that I considered it was very unjust, and I was getting all the information I could in regard to the matter, as I was to act officially upon it. I was anxious to have the ship tried. The reasons I want to give, I was anxious to have her tried, I had no personal interest to have her tried—it was for the interests of the Government to have her tried. By having the ship tried and weighted we would get some information as to her draft of water and her stability, a very important matter which was then being questioned, and it would have been for the interests of the Government if she had been tried at that time instead of being delayed.

Question. Do you mean to say that the Massachusetts was made ready for trial, and that you are now referring to the Massachusetts and not to the Indiana?

Answer. I think they were both just in the same category. As I recollect it, there was opposition to trying the Indiana and opposition to try the Massachusetts.

Question. Did it both come up at the same time?

Answer. No, sir; I do not think at the same time. Both were not reported at the same time.

Question. Do you remember the matters with relation to these ships and the conversation with relation to the ships separately, or are you now testifying with reference to matters that came up in connection with the Indiana as relating to the matters that came up in connection with the Massachusetts? I want you to differentiate between the two ships, if possible.

Answer. The same argument was used in both cases. I can not say how far apart those discussions occurred, but the same influences

were at work to prevent the trial trip in case of the Massachusetts as of the Indiana.

Question. Are you able to say how far apart the two ships were prepared for trial?

Answer. Not more than several months, I think.

Question. Now, you say the Massachusetts was, in fact, prepared for trial?

Answer. She was offered for trial.

Question. Will you say she was prepared for trial?

Answer. Yes; in my judgment she should have been tried.

Question. Was she prepared for trial?

Answer. Yes, sir.

130 Question. Now please describe fully what that preparation for trial consisted of, referring now to the Massachusetts.

Answer. You want the Massachusetts?

Question. Yes, I want the Massachusetts.

Answer. For me to state exactly where two ships of the same kind, building at a yard, the difference between one and the other being ready, is a question of memory entirely.

Question. I understand.

Answer. But if you ask me the question what was necessary when I say she was ready to make that trip, I can tell you.

Question. There are certain prescribed requisites here which must be fulfilled before a ship is ready for a trial. Now, I am asking you to state what those requisites consisted of, and whether or not they were complied with by the claimant company, so as to entitle them to the benefit of a trial.

Answer. The ship had to be weighted to a certain draft. That was one of the requirements, and if they could not put the armor on they would have to add weights to the vessel to bring her down, and in case of the coal, they could not fill the bunkers with coal and they would put in sufficient coal to use on the vessel on her trial trip, and they would add weight in the position where the magazines were going to be. They would put weights in the different magazines and in the shell room. They generally hired pig lead for that purpose, or pig iron, and distributed these weights around the ship at the place they would go on, as near as possible, when the ship was completed.

Question. Was she weighted properly at that time?

Answer. I can not say whether she was exactly weighted, because I think they were trying to find out from the Government whether they were going to allow the trial before they added all the weights. The shipbuilder was ready to add all the weights. They would have to be added when the board, on which I always had a representative, was ready, to see that the weights were on board, and everything of that kind.

Question. That is to say, they stated that they were ready to put the weights on?

Answer. I think that would be better; they were prepared to go to trial and had complied with all the terms of the contract.

Question. Were they, in fact, ready at that time?

Answer. I considered they were ready for trial; yes.

Question. But they did not have the weights on.

Answer. I do not know whether they did or did not. That is pinning me down too close from memory.

Question. The contract provides that certain conditions precedent shall be complied with before the ship is ready for trial, and they have been read to you by Mr. Fay.

Answer. Yes.

Question. And if I understand you correctly, you state that she was ready for trial?

Answer. Yes.

Question. Now, I want to know the means of your information with reference to that matter; definite views with reference to this readiness.

131 Answer. Let me explain to you that when a shipbuilder offers a ship for trial he does not say: "I am going to try this ship tomorrow, but I will be ready on such a day for trial." They may be a month ahead of time. No doubt it was six weeks. Now, if the Department replies in the affirmative, if he is going to have a trial, then he goes ahead and adds these weights and such things as that.

Question. But the contract provides as follows:

"provided however, and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract," and so forth.

Answer. Yes; I am familiar with that.

Question. Now, what I want to know is whether or not this state of preparedness called for in this provision of the contract existed at that time or not.

Answer. It did. The ship was prepared for the trial trip.

Question. Do you mean to say her hull, her fittings, her machinery, her engines and boilers, her appurtenances and equipment, and all work required, except the armor, had been done?

Answer. No, sir; you can not finish a ship complete without the armor on.

Question. I say, except the armor.

Answer. There are things you can not do until you put the armor on. There is a clause that provides for it.

Question. Well, omit those things that are dependent upon the armor, and I ask you to state whether or not everything else had been done.

Answer. No, sir; there are certain things always on every ship when she is offered for trial that are not completed. In the engine department they do not cover the pipes. In the hull part they do

not put up certain joiner work. They hold back for painting and the decks are not completed or anything like that, because they are all subject to damage while the ship is being under trial; besides you can not discover defects in the ship and construction of her if all this work is covered up at the time of the trial.

Question. Then you would not pretend to say that the ship and her machinery, boilers, appurtenances, and equipment were completed?

Answer. At the time she was offered for trial?

Question. Yes.

Answer. Certainly not. No ship ever is. It would be an impractical thing to do it. It would be a disadvantage to the Government to have it done.

Question. What percentage of completion had taken place at that time?

Answer. That is, on the whole contract, do you mean to say, eliminating the armor and barbettes?

132 Question. Yes. It is our contention to these specific things that the contract provides must be completed before the vessel shall be subjected to her trial which I have enumerated. I ask you what percentage of completion had taken place with reference to those particular features of the ship.

Answer. That is a pretty broad question to ask an architect, but perhaps I can give you an opinion, considering that the armor would be 10 per cent of the contract to divide it up into percentages.

Question. Eliminate the armor entirely.

Answer. That would be 90 per cent. To complete the ship in all respects would be 90 per cent when she would have the last paint on, the furniture on board, and the linoleum on the decks.

Question. I am not asking you about the linoleum or anything of that kind.

Answer. I am trying to tell you what constitutes the percentage of these hulls and fittings. Taking 10 per cent for the armor, the whole hull as completed would be 90 per cent, if she was completed in every sense of the word. When offered for trial, it would be between 75 and 80 per cent of the contract completed.

Question. Have you at this time a definite recollection as to that matter, or are you speaking generally?

Answer. I am speaking from the knowledge of a constructor who examined the vessel and is familiar with all her parts, familiar with the acceptance and delivery of many vessels to the Government, and I considered it my especial business.

Question. I am simply trying to arrive at the sources of your specific knowledge with relation to the condition of this vessel at this particular time, your present recollection.

Answer. If you were a naval architect and were discussing this question with me, I could answer these questions in a different way from which I answer you. You not being skilled as a naval architect, I will have to answer the question so that you will understand it.

Question. I not only want to understand it myself, but I want the court to understand it, and they are not naval architects.

Answer. I consider you the court, and am trying to answer you so that you will understand it. They have to be framed and I have to give a little thought to them so that you will understand them. I do not want to make a technical answer that you will have to get somebody to answer for you, and I am at a little disadvantage. That is what I wanted to impress upon you.

Question. I shall not object to you answering these questions even in a technical way, if you care to answer them in technical terms. I simply want to ascertain, if I can, from you, what the actual conditions were with relation to the completion of those parts required to be completed by the contract before the vessel should be subjected to the trial provided for in the tenth clause of the contract.

Answer. I think I have answered that already.

Question. Then if — understand you correctly, you would not pretend to state that the hull, fittings, machinery, engines, boilers and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, were completed at that time?

Answer. When she was offered for trial?

133 Question. Yes.

Answer. No, sir.

Question. But only in a partial statement of completion.

Answer. That would be an impracticable thing to do. It is not done at the present time.

Question. You would not pretend to say she was properly weighted for her trial trip at the time you examined her?

Answer. Not at the time she was offered for trial.

Question. Was she at the time you examined her?

Answer. No, sir. Let me add, they were then going through the process of weighting her. They probably had a month's time or three weeks to complete her.

Question. Had they commenced weighting her at the time you made this examination?

Answer. Yes, sir.

Question. Then the time you made this examination must have been prior to the time that this application for trial had been rejected?

Answer. No, sir; prior to the time that they had set for the trial trip. They fixed a date when they will be ready for trial. They do not say they are ready at that time.

Question. Do you know they fixed a date in the case of the Massachusetts?

Answer. I could not say specifically about the Massachusetts, but it is the universal custom for the shipbuilder to fix the date and notify the Department at least a month before the time she is ready, because the Government has to do a lot itself. It has to select a board of officers. It has to stake out the course and has to select vessels available to designate the course.

Question. But you would not be willing to say that in the case of the Massachusetts it had been done?

Answer. That they had fixed the date?

Question. Yes.

Answer. I can not say that specifically, but to the best of my belief they did fix the date for the trial trip.

Question. Neither could you say specifically that you saw that vessel weighted at all?

Answer. I could say they were weighted; certainly they were putting the weights aboard getting ready for the trial.

Question. You mean the Massachusetts?

Answer. I mean the Massachusetts.

Question. When was that?

Answer. Just exactly when I can not say. It was about 1895. I should think, somewhere around there. I know I was made chief constructor in 1893, and I get at it in this way. They were over two years or two years and a half getting the ship finished before she was accepted, and that would carry it up somewhere between 1895 and 1896, I should think; somewhere along there.

Question. How much of weight had they put on the ship and what was the character of the same at that time?

Answer. My recollection of the matter was that they were putting pig lead aboard her; they were also using pig iron. They got whatever weight they could get handy. That was the usual custom, pig iron and pig lead.

134 Question. Is it not a fact that Mr. Cramp suggested that he could and would use pig iron in the trial trip, in the preparation of the Indiana for a trial trip, and it is the Indiana you are now referring to and not the Massachusetts?

Answer. There is a possibility of a doubt, but I think it is the Massachusetts. To carry such fine points as that in a man's mind after so many years I would have to put it down pretty fine. If I am allowed to look up records and such things as that, I probably can give you more specific answers.

Question. You are at liberty to do so. What we want is definite information in this matter, and it becomes imporatnt to determine whether the ship in question was in fact ready for this trial trip in accordance with the provision of the contract referred to, and I am trying, if possible to get you to give us specific information with reference to that matter, rather than general impressions.

Answer. I do not think I can answer that question specifically, whether she was exactly ready. I know they were getting her ready and she would have to be ready or else the board would not try her.

Question. Did you have anything to do with the appointment of a board called the Bradford board?

Answer. No, sir.

Redirect examination by Mr. FAY:

Question. Do you remember whether or not one of these vessels, the Indiana or Massachusetts (which were twin vessels, were they not?)——

Answer. Only one set of plans for all three ships.

Question. Was actually weighted down, temporary work put upon her, and, in fact, taken to sea on what was called a contractor's trip?

Mr. COLLINS: Objected to as leading and suggestive and not properly redirect examination.

Answer. To the best of my knowledge and recollection, that was the case.

Question. Can you remember which of them it was?

Answer. That went to sea?

Question. Yes; that took the contractor's trip?

Answer. My opinion is they both had a contractor's trial. You understand the difference between a contractor's trial and a Government trial. The contractor does that on his own hook. That is not so strictly with me as the Government trial.

Question. Now I call your attention to this proviso and this language in it, "except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower," and let me ask you if that work was incomplete whether or not there was coordinate work on the vessel that could not possibly be put upon the vessel with this excepted work omitted?

Mr. COLLINS: Objected to as leading and suggestive.

Answer. I have made a statement of that in one of my previous answers, that unless the diagonal armor, barbette armor, turret armor, conning tower, and such things were furnished, it would be impossible to complete certain work on the ship. You could not complete the joiner work, you could not complete the decks, and of course the painting. You could not do anything of any account.

135 Question. Now, the tenth article of the contract which provides for a trial trip provides that that trial trip shall be for the purpose to test the hull and fittings and machinery, including engine, boilers and appurtenances, and equipment in the speed of the vessel. In the condition that you found the Massachusetts when you examined her, would a trial trip have tested the hull, fittings, machinery, engine, boilers, and appurtenances in the speed of the vessel?

Answer. It would if they had added the extra weight that was necessary to bring her down to the proper displacement which they were then putting on board.

Question. Now, the proper weight simply was in lieu of the armor, etc.?

Mr. COLLINS: Objected to as leading and suggestive.

Answer. Yes, sir; certainly.

Question. I will ask you this question. Prior to this refusal to test either of these vessels, what had been the policy of the Department with respect to permitting a trial trip when the contractors tendered themselves ready to make it?

Mr. COLLINS: Objected to as immaterial and vague.

Answer. In reply to that, whether it could be called the policy or custom of the Department—I think it would be more a custom of the Department—I will say that when the contractor offered a ship for trial the question was generally referred to the two Bureaus to

make report if in their judgment it was for the interests of the Government to have the trial trip at that time, and if the ship was in proper condition to have the trial, and on the report of those two chiefs of Bureau, the engineer in chief, and the chief constructor, the Department generally ordered that trial.

Question. During your connection with the construction corps of the Navy do you recall any instance in which a special board had been detailed by the Secretary to investigate the ship and report whether a trial trip should be had?

Mr. COLLINS: Objected to as immaterial.

Answer. That was the first case. I am referring to the Indiana.

Question. Have you any recollection prior to that refusal wherein the Government had ever refused to permit a trial when the contractors tendered themselves ready to make it?

Answer. I do not know of any case where they refused to have the trial. Sometimes the Bureaus made suggestions that they do a few more things before the trial, which would be complied with. But the opinion of the two Bureaus was generally taken except in this case, and this has impressed me, because I was the chief constructor at the time and did not quite understand the reason of having this special board.

Mr. COLLINS: Government's counsel reserves the right to recall Admiral Hichborn for further recross-examination if the same shall be deemed necessary.

The examination by counsel being concluded, in answer to the final interrogatory by the Commissioner, the witness says he knows nothing further at the present time material to this claim.

PHILIP HICHBORN.

Sworn to and subscribed before me this 6th, day of November, 1907.

ROBT. L. MILLER,
Commissioner.

136 Deposition of Charles H. Cramp..... —
Exhibit C. H. C. No. 1 (sworn statement of comptroller as to indebtedness on October 10, 1894, and February 8, 1896) ..... —

F. W. COLLINS,
Assistant Attorney for Defendants.
JOHN C. FAY,
Attorney for Claimant.

Deposition of Charles H. Cramp, for Claimant, Taken at Devon, Pa., on the 29th Day of July, A. D. 1907.

Claimant's counsel, John C. Fay; defendants' counsel, F. W. Collins.

CHARLES H. CRAMP, having been produced as a witness on behalf of the claimant, was by me affirmed before any question was put to him to tell the truth, the whole truth, and nothing but the truth relative to said causes; and thereupon deposed and said that his name is Charles H. Cramp, that his occupation is a retired shipbuilder, that he is 79 years of age, that his place of residence is Philadelphia, that he has an interest in the claim.

And thereupon the said Charles H. Cramp was examined by counsel for the claimant, and in answer to interrogatories testified as follows:

1. Question. Mr. Cramp, calling your attention to a paper purporting to be a final receipt and release for the construction of the Masachusetts, printed on pages 493 and 494 of the record and dated on the 23d of November, 1896, I would ask you if at that time—in November, 1896—your company had a claim for the care and maintenance of the Massachusetts for the period that elapsed after the expiration of the contract term?

137 Answer. It did.

2. Question. Do you know where that claim was pending in November, 1896?

Answer. That claim was presented in my letter with the accompanying documents under date of September 30, 1896, to the Secretary of the Navy under the authority of the act of June 10, 1896, for examination and report to Congress.

3. Question. When you signed the release in November was there any understanding or agreement or suggestion either on the part of the Secretary of the Navy or your company that that receipt was to cover in any manner the claim that had been submitted by you on the 30th of September, 1896?

(Objected to by Government's counsel as leading and suggestive; also for reason that it is an attempt to vary and explain terms of an instrument in writing already executed and adjudicated by the courts.)

Answer. Not by any means.

4. Question. I show you a pamphlet—a printed pamphlet—containing the claims submitted by your company under the act of June 10, 1896, and call your attention to pages from 36 to 73, inclusive, and ask you if they correctly state the condition under which the claim arose and the cause for it?

(Objected to by Government's counsel for the reason the pamphlet is not identified as an official document or shown to be competent evidence, is immaterial, and for reasons given in objection to question 3.)

Answer. It does. It was prepared with a great deal of care, after much investigation, and frequent conversations with the Secretary, and some of those conversations got to be pretty warm, because the Secretary seemed to be influenced by the Judge-Advocate-General.

5. Question. Then the statement contained in those printed pages were prepared when the matter was fresh in your mind?

Answer. At the time; yes, sir;

6. Question. And they correctly stated the condition of affairs?

(Objected to by Government's counsel as leading and suggestive; also for reasons stated in objection to questions 3 and 4.)

Answer. Yes, sir; exactly.

7. Question. Now, Mr. Cramp, calling your attention to the original contract, and to the third article—do you remember the provisions of that article with reference to the Government's accepting the vessel without armor in the case of their delay in furnishing it?

Answer. We put wood on in place of armor on one vessel, and then Bradford was sent up to see if she was ready. He did not report that she was not ready according to the contract, but that she was not finished.

8. Question. If the Government had lived up to the third article of the contract and taken the vessel in her unfinished condition, would you have been at any expense for the care and maintenance of the ship?

(Objected to by Government's counsel as leading.)

Answer. Not at all. I went frequently to Washington on that account and spoke to the Secretary. He acted directly against it, under the influence of others.

138 9. Question. In your various conversations with the Secretary, and in your various letters, did you call his attention to the fact that you were put to great expense in the care and maintenance of the vessel?

(Objected to by Government's counsel as leading and not the best evidence.)

Answer. Time and time again. I saw him in Washington and spoke about it, and I also called his attention to the adverse report of Bradford.

10. Question. Did he ever intimate that under your contract you were obliged to do it?

(Objected to by Government's counsel as leading and not the best evidence.)

Answer. No.

11. Question. According to the language of this relase, the words are "Claims and damage whatever in law or in equity for or by reason of or on authority of the construction of the vessel under the contract aforesaid." Now I will ask you whether any of these claims for damages and care and maintenance were under the contract for the construction of the vessel?

(Objected to by Government's counsel as leading and suggestive; also an attempt to vary, interpret, and explain the terms of a written instrument in the form of a contract long since executed and adjudicated by the courts.)

Answer. No; notwithstanding we could have made a great many claims.

12. Question. What scope do shipbuilders give to the word "construction" of a vessel?

(Same objection.)

Answer. It varies now from what it did then. Then it was whatever the Secretary insisted on or the inspectors demanded—and it was very arbitrary.

13. Question. Don't the word "construction" refer to the building of the vessel under the plans and specifications?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir.

14. Question. Does the word "construction" have any relation to the care and maintenance of the vessel?

(Objected to by Government's counsel as leading and suggestive.)

Anwer. No; not at all.

15. Question. Did the Secretary report to Congress upon the claim that you submitted on the 30th of September, 1896?

(Objected to by Government's counsel as leading and suggestive.)

Answer. He did, I think.

16. Question. He made a report to Congress?

Answer. I think so; I don't now remember that.

17. Question. I want to call your attention, Mr. Cramp, to the special release in the Massachusetts case, which is printed in your claims submitted to the Secretary in September, 1896—one dated the 10th of May, 1894, with respect to the Indiana, and two dated October 5, 1894, and February 1, 1896, respectively, in reference to the Massachusetts, in which your company undertook to release the United States from any and every claim for loss or damage hitherto sustained by reason of any failure on the part of the United
139 States to comply with the contract or on account of any delay hitherto occasioned by action of the United States. Now, were all those three releases brought about in the same way?

Answer. Under the same circumstances—and state of money.

18. Question. Commencing, now, with May, 1894, in the Indiana case—at that time had you offered the Indiana for a trial trip under the third article of the contract?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes; time and time again.

19. Question. And had you, under the direction or acquiescence of the Secretary, put on the temporary work necessary, by reason of the absence of the armor, to make the vessel seaworthy?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes; and we put in the weight, too.

20. Question. That cost about $17,000?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir.

21. Question. Now, after that had been done, did the Secretary refuse to allow you to make the trial trip under that condition?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir; positively.

22. Question. Now, according to my estimate, if the vessel had been allowed to take her trial, then your company would have received somewhere between $500,000 and $600,000?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir; and it was quite an object at that time.

23. Question. When the Secretary refused to permit the trial to take place, you visited Washington and had several interviews with him?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir; quite a number of interviews.

24. Question. Was his refusal based on any other thing except that report of Bradford?

(Objected to by Government's counsel as leading and suggestive.)

Answer. It was based altogether on that, and the influence of the Judge-Advocate-General, who was entirely adverse to the whole thing.

25. Question. About what was the financial condition of your company at that time?

(Objected to by Government's counsel as incompetent and immaterial.)

Answer. We were very much in debt to the bankers—private bankers and others.

26. Question. About how much in loans were you carrying then?

(Objected to by Government's counsel as incompetent and immaterial and not best evidence.)

Answer. I can't tell, because it is so long; approximately it was in the neighborhood of $1,300,000. (See Exhibit C. H. C. No. 1, page 78.)

27. Question. Was that being carried at normal or abnormal rate of interest?

(Objected to by Government's counsel as irrelevant and immaterial and not best evidence.)

140 Answer. Abnormal; not only a high percentage, but a bonus to the banker.

28. Question. Did you communicate that fact to the Secretary?

Answer. Yes, sir.

29. Question. Was there any difficulty in the extension of loans at that time?

(Objected to by Government's counsel as irrelevant and immaterial and not best evidence.)

Answer. Yes, sir; they refused to extend at all.

30. Question. About how many employees was the yard carrying at that time?

Answer. About 5,600.

31. Question. About what was your pay roll, your weekly pay roll?

(Objected to by Government's counsel as irrelevant and immaterial and not best evidence.)

Answer. About somewhere between $50,000 and $60,000 a week.

32. Question. And that had to be provided for?

Answer. Yes; we never knew a case in the history of Philadelphia where the shipyard men were not paid weekly.

33. Question. About how many people, Mr. Cramp, were dependent upon these employees?

(Objected to by Government's counsel as irrelevant and immaterial and not best evidence.)

Answer. Well, each one would average about 4, so that would be about 20,000 people or more.

34. Question. To shut up the shipyard would really have been a calamity?

(Objected to by Government's counsel as irrelevant and immaterial and not best evidence.)

Answer. Yes, sir; we could not think of it. My son had everything like that in charge—the financial end—and he was in communication with the bankers.

35. Question. Did you very frequently tell the Secretary these exact conditions?

(Objected to by Government's counsel as leading and suggestive and immaterial.)

Answer. Very frequently.

36. Question. And he was frequently made aware of them?

Answer. Yes, sir.

37. Question. Did the Secretary, when he finally proposed to make you advances, as he called it—did he insist that you should sign these three releases?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Well, there were certain ones that he insisted that I sign; I do not know how many there were now.

38. Question. That is the form in which I read to you a moment ago and which is printed on page 122?

Answer. Yes, sir.

39. Question. Did he tell you positively and definitely that he

would pay you this money on no other condition except the signing of the release relinquishing your claim for damages for delay?

(Objected to by Government's counsel as leading and suggestive; also for reasons given in objections to questions 3 and 4.)

141 Answer. Yes, sir; it was no signature, no money. That was the final decision; if we did not sign, we did not get any money; and he was urged by other influences.

40. Question. Did the same condition of affairs that related to the special release in the Indiana case attend the special releases in the Massachusetts case?

(Objected to by Government's counsel as leading and suggestive; also for reasons given in objections to questions 3 and 4.)

Answer. Yes, sir.

41. Question. And the same refusal of a trial trip?

Answer. Yes, sir.

42. Question. The same financial condition of the company?

(Objected to by Government's counsel as leading and suggestive and immaterial.)

Answer. Yes, sir.

43. Question. And the same determination of the Secretary to refuse payment unless the releases were signed and the bonds given?

(Objected to by Government's counsel as leading and suggestive and immaterial.)

Answer. Yes, sir.

44. Question. Can you say that that signature to those three releases was voluntary or coerced?

(Objected to by Government's counsel as leading and suggestive, and for reasons given in objection to questions 3 and 4, which objections are reserved and will hereafter apply to all similar questions.)

Answer. I felt as though I was held up on the plains—it was a regular "holdup."

45. Question. Did the Government owe you a large amount of money on other vessels? (See Exhibit C. H. C. No. 1, page 78.)

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir; there was money tied up in other vessels.

46. Question. If the Government during this period from 1890 to 1896 had kept their contracts for building these vessels and made the payments and the work had progressed normally, without delay, would your company have suffered any financial embarrassment?

(Objected to by Government's counsel as leading and suggestive.)

Answer. No, sir; not in the slightest.

47. Question. So it was really the financial embarrassment you suffered which was due to the failure of the Government to keep its obligations?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Exactly. The Indiana, lying in the Delaware, formed a large growth of grass, which retarded the vessel's speed wonderfully. When we did come to her trial, we tried to get it off by outward application, but could not.

48. Question. Is it not a fact, Mr. Cramp, that you ran this trial trip over a very unfavorable course—a course where the water varied in depth?

(Objected to by Government's counsel as leading and suggestive.)

Answer. Yes, sir. The Secretary said, "You can go all the way down to Charleston." He wanted us to go to Canada or some other place to get the bottom cleaned. This would have been at an enormous expense to send them two or three thousand miles away to get their bottoms cleaned.

142 49. Question. Now I will ask you, Mr. Cramp, if you received from the United States—the Indiana case and relatively the same percentage in these other cases in which suits are pending—about $190,000, in the Indiana case, would that compensate the company for the losses sustained by reason of the damages and care and maintenance?

(Objected to by Government's counsel as leading and suggestive.)

Answer. No, sir; for there were many impediments to our progress during construction, especially of the Indiana, the first battle ship. Our place was a kindergarten, an experimental place, and all our letters were sent to California, and drawings, and when it was to their interest to do so they altered our letters.

50. Question. Now, Mr. Cramp, I will ask you one more question: If you thought that the final releases in the Indiana and Massachusetts cases and other cases—that is, the first class of the releases that I called to your attention—if you had thought that they included a relinquishment of claims for damages for delay and for care and maintenance, would you have signed those releases?

(Objected to by Government's counsel as leading and suggestive; also for reasons stated in objections to questions 3 and 4.)

Answer. No, sir.

The said witness was then cross-examined by the counsel for the United States, and, in answer to interrogatories, testified as follows:

1. Question. Mr. Cramp, do you recall when it was that you had a conversation with the Secretary of the Navy with relation to the claim which you had against the United States and prior to the time of the execution of the release in question upon the Massachusetts?

COUNSEL FOR CLAIMANT: Which particular release?

COUNSEL FOR DEFENDANT: The final release; I am now referring to the final release.

Answer. I had many conversations with him, both on the Indiana and Massachusetts. Of course, both conversations would be very much alike. I had many conversations, and, in some, pretty warm conversations, because we felt very much wronged.

2. Question. Did you suggest to the Secretary at that time the incorporation in the release of any form of protest or protection to yourself when you signed it?

Answer. I don't remember whether I did or not, if I understand your question right.

3. Question. Do you remember whether or not at the time you signed the release you made any formal protest against signing it? By "formal protest" I mean did you leave anything in writing with the Secretary of the Navy?

Answer. Nothing in writing. It was a frequent protest, and very vigorous ones, too.

4. Question. But all orally?

Answer. Yes; all orally.

5. Question. Do you remember who was present when the final release was passed in the case of the Indiana and Massachusetts?

Answer. I don't remember now; the Judge-Advocate may have been, but I don't remember.

6. Question. Do you know who the Judge-Advocate was at that time?

Answer. I am not sure whether it was Lemly or Remey just at that time.

143 7. Question. Was the final release signed by you at the Navy Department?

Answer. I think it was in the Secretary's office.

8. Question. Now, you have spoken of the Indiana and the Massachusetts. Have you any definite recollection with reference to conversations had with the Secretary of the Navy with respect to the other ships on which suits have been brought in the Court of Claims?

Answer. There were so many conversations, and they were all warm, and we felt very much aggrieved——

9. Question. Are you certain that you had conversations with the Secretary of the Navy with respect to signing of a final release on ships other than the Massachusetts and the Indiana?

Answer. I don't think I ever had any conversations on any other ship; I know I didn't.

10. Question. On no other ships than these two?

Answer. First on the Indiana, because it was not necessary to have much more on the Massachusetts, because there was where all the damage was done.

11. Question. On the Indiana and Massachusetts?

Answer. Yes.

12. Question. And after that, according to your recollection, you did not have any conversation?

Answer. No; I know we did not.

13. Question. And so far as you remember as to the other ships you did not protest against the signing of the final release?

Answer. I did protest against signing all the releases, because on account of the method put to us—I mean I felt that it was a "hold up," and I always protested both on the method—and I lost my temper frequently, because the thing was so unjust and arbitrary.

14. Question. Well, I understood you a moment ago to state that

the conversations which you had with the Secretary of the Navy related to cases of the Massachusetts and the Indiana.

Answer. They came first, and of course it was not necessary to talk about any other, nothing said about the others at all.

15. Question. Well, that is what I want to know, whether there was anything said about the other ships.

Answer. Nothing.

16. Question. Nothing?

Answer. Whatever damages occurred there—any "holdup," anything like pressure of money in the money market. In fact, the Government was very careful about it—that is, they did not care whether the ship was finished or not; they did not care about any argument we urged in favor of prompt attention to their part of the contract.

17. Question. Now, Mr. Cramp, if I understand you correctly, the principal conversations had between you and the Secretary of the Navy with respect to your claim for damages against the United States Government was as to the battle ship Indiana?

Answer. Well, it was hard to separate the two. Frequently both were referred to; they were both of the same group, both in the same contract; contract signed on the same day.

18. Question. The Indiana was battle ship No. 1?

Answer. Yes; ahead of all others.

144 19. Question. But you did have some conversations with the Secretary of the Navy of like nature with respect to the Massachusetts?

Answer. Yes.

20. Question. But not with respect to other vessels?

Answer. No other vessel came under that form of detention.

21. Question. There are suits brought on the other vessels?

Answer. Well, they had no bearing on this case at all; had nothing to do with it.

22. Question. There were final releases given as to these other ships?

Answer. That must have been after the regular trial trip. The other ships had regular trial trips, and these, the Indiana and Massachusetts, had not.

23. Question. Did I understand you to state that you made a proposition to the Secretary of the Navy to the effect that you were willing to send the Indiana and the Massachusetts upon trial trips before they had their regular trial trips?

Answer. Yes; according to the third section of the contract.

24. Question. Do you remember when it was that you made this suggestion to the Secretary of the Navy?

Answer. I believe that it is in print in one of these documents, in regular print; I can't remember dates, of course; these dates are correct from the documents.

25. Question. You think that is in print?

Answer. As soon as we arrived at this position we could not go ahead, because the Government did not furnish these materials.

26. Question. Now, Mr. Cramp, I read from the third paragraph of the contract the following:

"Provided, however, and it is expressly understood, covenanted, and agreed that if upon the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances and equipment, and all other work required under this contract, excepting the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part shall not have commenced the delivery of said armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract"——

Now, I will ask you to state, Mr. Cramp, if, at the time the Indiana was tendered by you to the Navy Department for the trial trip in question, she was completed as prescribed in this clause to which your attention has been called?

Answer. She was completed as far as we could complete her, with the exception of what the Government had neglected to furnish us; but of course that was not supplied, and therefore she was not completed to that extent.

27. Question. Was she completed as to her hull, fittings, machinery, engines, boilers, and appurtenances and equipment and all other work required under this contract except the fitting, fixing, placing, and securing of the armor for her side belt, etc.?

Answer. Is that all of that section?

28. Question. No; it is not all of the section; but it is the condition precedent to the trial trip.

145 Answer. Well, we had to prepare to meet that trial trip by putting weights aboard to make the vessel draw the same amount of water. We put a large amount of pig lead aboard to supply the weight of the turrets and side armor, and we had to board up the recesses where the armor had to go, so we could try her.

29. Question. Mr. Cramp, I do not think you fully understand the question, perhaps. It is limited to the completion of certain parts of the vessel which are mentioned here. Now, are you certain that those parts of the vessel mentioned here as being necessary for you to complete prior to the trial trip were in fact completed at that time?

Answer. Whatever we had to do was completed. Of course we could not complete the vessel without the armor, and without the guns, and without the conning tower, and numerous things the Government had to furnish, and with all these things—that is, without them—we could not finish her.

30. Question. What I am trying to arrive at is whether or not the vessel as to its hull, fittings, machinery, engines, boilers, and appurtenances and equipment, except the fixing, placing, and securing of the armor had been done.

Answer. There is no power in the world can complete a contract and say everything has been done, and——

31. Question. I am excepting the armor, and cut that out and the things that naturally attach to the armor.

Answer. Everything that we should have done and more—for

instance, we had to go to work and hire lead to put in the vessel to get it down to draft to compensate for the weight of the turrets, the armor, and guns, the tower, and the ammunition supplies which the Government had to furnish, and all those things.

32. Question. Now, are you certain that the engines and machinery were completed and ready for the trial trip at the time that you talked with the Secretary of the Navy with relation thereto?

Answer. Positively, because they tried them at the shipyard; they could not have tried them if they had not been completed. On one occasion we went out to sea before we went on our regular bounty trial trip.

If I may make a remark here, the Government had to furnish the ammunition, guns, and ammunition supplies, and hoists——

33. Question. Well, those were not indispensable to the trial trip?

Answer. Oh, no; but they had to furnish them.

34. Question. Then why was it, if you know, that the Secretary of the Navy refused you this trial trip if all of the conditions of the contract which gave you the right to a trial trip had been complied with by your company?

Answer. The Secretary of the Navy sent a board to us, not to see whether we had completed the contract, but to see whether the ship was ready for trial. The board reported that these things were not done; that the ship was not ready for trial. They did not report on the question of contract. I had an altercation with Bradford and the Secretary of the Navy about him coming for this investigation.

35. Question. Who were the members of this board?

Answer. The head of the board was Bradford—I don't recollect his title; I think it was Lieutenant-Commander Bradford, afterwards captain, and now admiral. He was very arbitrary
146 about it, and we had a very hot time. He said he had nothing at all to do about the contract and would not consider it, but just whether she was ready for trial. The vessel was examined very carefully by him, and we found that the question of the contract did not come before him at all—it was only whether the vessel was ready for trial or not, and that was all that he was going to bother with, and he went back and reported that the vessel was not ready for trial. He said she was not finished. Of course she was not finished. That was the meanest thing that happened during the whole construction of the ship. He seemed to come ready to fight us on the question and did not want to look at the contract or consider it at all.

36. Question. Well, Mr. Cramp, did this board which examined the ship in question examine any other ships than the Indiana as to readiness for trial?

Answer. No; that was all.

COUNSEL FOR CLAIMANT: At that time?

Answer. Yes; at that time. That was a finisher.

COUNSEL FOR CLAIMANT: They went up on the Massachusetts?

Answer. I do not recollect that.

37. Question. You are talking now in reference to the Indiana?

Answer. Yes, sir.

38. Question. If the record shows that the same board made an

examination as to the readiness of the Massachusetts for her trial trip and reported adversely thereon, you have no recollection of it at this time?

Answer. Except to this extent—in the Indiana, we prepared the Indiana by boxing up that part which should have had the armor on, so as to make the ship which was to take the armor, so as to make it fair; and also we put a weight of pig lead aboard to compensate for the weights of turrets, guns, and everything that was necessary for the Government to put aboard. We prepared that, and then reported her ready for trial; but Mr. Bradford's adverse report prevented that. But in the case of the Massachusetts we saved that expense—we did not go to work at that; we did not put that work on. That is the difference between the Massachusetts and the other; one we prepared and the other we did not.

39. Question. Now, Mr. Cramp, I will ask you to state whether or not there were any other causes of delay in the completion of the Indiana and Massachusetts then the failure on the Government's part to deliver the armor at the times and in the order called for by you?

Answer. There was nothing at all, sir. It commenced very early in the progress of the contract—the neglect of the Government. The first delay took place about the delivery of the diagonal armor. That was the first delay; and the Government paid no attention to our protests.

40. Question. Well, I note you state in your direct examination that your shop was an experimental one—used as an experimental station by the Government—and that you were delayed by changes in drawings, etc., in addition to the delays in the delivery of armor.

Answer. My remarks were more in the way of expense in making those things, and delays in the way of expense in getting drawings up. My remarks referred more about that than on account
147 of misunderstandings and the—but whether they were delays or not, we were ready at the time. When we were ready to finish her we had abundance of time to finish her if the Government had furnished what it was to furnish.

41. Question. I will ask you to state, Mr. Cramp, whether or not the Cramp Ship and Engine Building Company have ever completed a battle ship or an armored cruiser within the periods called for by the contract; if so, give the name of the vessel and the period of the construction.

Answer. I think there were, but I do not remember the names of the vessels. I do not know the names of the vessels, but in every case of our contracts there were a great many changes going on and delays, and the delays were not on our part, but due to or on account of the innumerable changes made constantly by the Government.

42. Question. Will you kindly investigate the records and give the name or names of the battleship or armored cruiser which has been completed by your company within a like contract period of that of the Indiana and Massachusetts?

Mr. FAY (counsel for claimant): I will state on record that I will

have that investigation made and furnish it to the assistant attorney. Mr. Cramp is not able to complete the investigation.

Answer. No ship was ever built but what alterations occurred. The Indiana drew a foot and a half more water than the Government expected. It was the Government's fault. Wherever there was any shortcoming they never squealed, because it was their fault. Almost every vessel drew more water than it was expected to. I called the attention of the Government to that fact that the necessary information was not given to the Construction Board by the other boards. The other boards or bureaus did not furnish the Construction Bureau what they should; they did not seem to be working together.

43. Question. Mr. Cramp, in response to question No. 8, which was as follows:

"If the Government had lived up to the third article of the contract and taken the vessel in her unfinished condition, would you have been at any expense for the care and maintenance of the ship?"

Answer. Not at all.

44. You answered not at all. Do you mean by that that if the Government had finally accepted the ship in that condition that you would not have been put to any expense?

Answer. I do not mean final acceptance, because there was the other trial.

45. If the Government had merely made the preliminary acceptance of the ship in that unfinished condition, you would have to have been at considerable extra expense for her upkeep and otherwise, would you not?

Answer. No; we expected that would be included in the trial trip; the trial trip would have concluded and decided that.

COUNSEL FOR CLAIMANT: After the preliminary trial the ship goes into the custody of the United States.

WITNESS: Yes; and preliminary is a bad name for that.

Redirect examination by Mr. FAY, counsel for claimant:

1. Question. Mr. Cramp, referring to Admiral Bradford's board that made a report on the condition of the Indiana, after
148 you offered her for preliminary trial, on page 483 of the record the board reported that the vessel, quoting from the tenth article of the contract, that when the vessel was completed and ready for delivery she shall be subjected to a trial trip, and thereupon, seen on the same page, that she was not at that time completed and ready for delivery, and that they do not consider it fair to the interests of the Government that the trial should take place until the ship was fully completed and ready for delivery—was that the position that the Department took with *the* reference to the preliminary trials after these?

Answer. Yes. I shall begin by saying this: The Secretary had power to settle that, to permit us to make the preliminary trial under the conditions we asked for; he had power under the contract, but he left it to this board as to what they would say.

2. Question. After the report of the Bradford board you remember

in the Indiana case did the Department take the position that they would not allow a trial trip, preliminary trial trip, until the vessel was completed and ready for delivery?

(Objected to by Government's counsel.)

Answer. Now before I——

3. Question. What had been the custom between your company in the building of other vessels with respect to a trial trip in an unfinished condition; how many vessels?

Answer. There were no vessels similar to these vessels, and therefore the same thing would not apply to other vessels. We went right ahead and finished, and went on the trial trip. As soon as we reported that we were ready for trial—this was the first one of her time, battle ship No. 1, and before that no armor or anything like that to furnish, no turrets.

4. Question. Now take the New York. Did she not go out before she was finished on her trial trip?

Answer. I'm not sure about that.

5. Question. Ain't you a little mistaken in your dates? Let me call your attention in that regard to a letter of yours——

Answer. My recollection may be wrong about dates, but I know the Indiana was the first of her type; the only battle ship that had been built of that type. The New York was finished before that, but she was not a battle ship.

6. Question. She was a cruiser?

Answer. She was a cruiser, and no recesses had to be put in her side for armor.

7. Question. Well, on the Indiana you put on a lot of temporary work in order to make her fit to go to sea?

Answer. Yes, sir.

8. Question. And you did take here to sea?

Answer. Yes, sir; but the New York came before.

10. Question. Now the Massachusetts, when you received a payment in October you had not put any temporary work on her?

(Objection by Government's counsel as leading and suggestive.)

Answer. No; on account of the adverse report.

11. Question. Was or was not the Massachusetts as far advanced in October, 1894, as the Indiana was in May, 1894, except temporary work?

Answer. Yes.

149 12. Question. Do you remember the Bradford board passing upon the Massachusetts in October?

Answer. I don't remember that at all. They put a finishing stroke on the Indiana and I did not bother much about the other. That finished matters.

13. Question. And the Department adopted their report?

Answer. Mr. Bradford and his board had got nothing to do with the contract; he was sent here to see whether the ship was ready for trial, and he told me he was going to report that she was not ready for trial.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do- to state it, says: Nothing occurs to me just now.

In answer to redirect question No. 3, page 27, I would like to add that before the refusal of the trial trip to the Indiana it had been the universal custom for the United States to allow a trial trip whenever the company said they were ready, and the Bradford board was a departure from it and changed the previous policy of the Department.

CHAS. H. CRAMP.

Sworn and subscribed before me this 31st day of July, 1907.

[SEAL.] ISAAC ARROTT,
Notary Public.

EXHIBIT C. H. C. No. 1.

Filed January 13, 1908.

Statements of amounts due on U. S. Government ships.	Oct. 10, 1894.	Feb. 8, 1896.
U. S. S. "Indiana."		
1894.		
Oct. 10. 7 reservations, at $10,210.00	$71,470 00	
28th, 29th, and 30th installments, at $91,890.00	275,670 00	
" " Extras	24,009.55	
	371,149.55	
1896.		
Feb. 8. Balance of contract		$62,200.00
" " Extras		20,572.79
		82,772 79
U. S. S. "Massachusetts."		
1894.		
Oct. 10. 30 reservations, at $10,210.00	306,300.00	
28th, 29th, and 30th installments, at $91,890.00	275,670 00	
	581,970.00	
1896.		
Feb. 8. 7 reservations, at $10,210.00		71,470 00
28th, 29th, and 30th installments, at $91,890.00		275,670 00
Extras		20,013.00
		367,153.00
U. S. S. "Columbia."		
1894.		
Oct. 10. Balance of reservation	70,000 00	
U. S. S. "Minneapolis."		
1894.		
Oct. 10. 30 reservations, at $8,966.66	269,000.00	
28th, 29th, and 30th installments, at $80,700.00	242,100.00	
Trial trip bill	37,424.40	
Speed premium	414,600.00	
	963,124.40	
1896.		
Feb. 8. Nothing		
150 *U. S. S. "Brooklyn."* a		
1894.		
Oct. 10. 12 reservations, at $9,953.33	119,440.00	
1896.		
Feb. 8. 21 reservations, at $9,953.33		209,020.00
U. S. S. "Iowa." b		
1894.		
Oct. 10. 9 reservations, at $10,033.33	90,300.00	
1896.		
Feb. 8. 16 reservations, at $10,033.33		160,533.33
Total amount due October 10th, 1894	2,195,983.95	
Total amount due February 8th, 1896		819,479.12
Bills payable October 10th, 1894	1,450,000.00	
Bills payable February 8th, 1896		1,647,317.02

a No payments received on this contract from November 21st, 1894, to April 2nd, 1895.
b No payments received on this contract from September 28th, 1894, to April 2nd, 1896.

Philadelphia, Jan. 2nd, 1908.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

George D. Martin, being duly sworn, deposes and says that the foregoing is a correct statement as shown by the books of The William Cramp & Sons Ship & Engine Building Co., that he is the comptroller of said company, and that the foregoing statement was compiled by him.

GEO. D. MARTIN.

Subscribed and sworn to before me this seventh day of January, A. D. 1908.

ISAAC ARROTT,
Notary Public.

My commission expires February 20th, 1909.

The within statement may be filed with the papers in the case and printed with the deposition of Charles H. Cramp, the United States reserving the right of objection by reason of incompetency, irrelevancy, immateriality, or for any other reason which the Government attorney may deem proper.

JOHN Q. THOMPSON,
Asst. Atty. Gen.

Jan'y 13, 1908.

151 *f. Evidence Adduced by the Defendant.*

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Deposition of William E. Chandler, for Defendants, Taken at Boston, Mass., on the 22nd Day of September, A. D. 1910.

Defendants' counsel, F. W. Collins, Esq.; claimants' counsel, John C. Fay, Esq.

WILLIAM E. CHANDLER, being duly sworn on his oath to tell the truth, the whole truth, and nothing but the truth, does depose and say that his name is William E. Chandler; that he is 74 years of age; that his place of residence is Concord, Merrimac County, N. H.; that his occupation is that of lawyer; that he is not related to the claimants or any member of their firm, and that he has no interest in the result of the suit.

Thereupon the said William E. Chandler was examined by the counsel for the United States and testified as follows:

By Mr. COLLINS:

1. Question. Mr. Chandler, state your education, general and legal. Where were you educated?

Answer. Common school and academic education in New Hampshire; legal education at the Harvard Law School, 1853 to 1855.

2. Question. What national positions have you held?

Answer. Solicitor of the Navy Department, 1865; Assistant Secretary of the Treasury; Secretary of the Navy; United States Senator, and member of Spanish Treaty Claims Commission.

152 3. Question. How long were you Solicitor of the Navy Department?

Answer. March, April, and May, 1865.

4. Question. When were you Secretary of the Navy and for how long a period?

Answer. 1882 to 1885.

5. Question. During your incumbency as Secretary of the Navy what, if anything, did you have to do with the preparation and ultimately the execution of ship contracts; that is, contracts for the construction of ships of war?

Answer. The department, under my direction, made the contracts for the construction of the Chicago, Boston, Atlanta, and Dolphin.

6. Question. I will ask you to state how those ships were designated in the order of their construction, with regard to the present Navy.

Answer. They were the first ships of the new Navy, taking the place of the old wooden ships and the old monitors.

7. Question. Do you recall having had to do with the preparation of the various parts of the contracts which were finally made and executed between yourself, as Secretary of the Navy, and John Roach?

Answer. I remember well their execution.

8. Question. Do you recall the sixth clause of the sixteenth paragraph of the contracts for the construction of the ships you have named? I hand you at this time a copy of one of the contracts, that being for the construction of the Chicago.

Answer. I did recall it when it was shown to me within the last two or three weeks, and I do recall it now.

9. Question. I will ask you to state the purpose of that clause appearing in that contract, as intended by the Navy Department, speaking through you as its representative head.

Mr. COLLINS: The Government not waiving its objections heretofore made to the introduction of testimony explaining the provisions of the contract in suit, the same being its best interpreter, and the contract or one of a similar nature having been executed by the parties and adjudicated by the highest court, said testimony of this nature is believed to be entirely incompetent and inadmissible and is only offered at this time in view of the fact that the claimants have heretofore introduced testimony bearing on this matter, over the Government's objection, and in view of the further fact that the Court of

Claims has recently remanded this case with a suggestion that either party may take testimony with relation to these matters.

Answer. I am unwilling, even after the statement made by counsel for the Government, to answer without saying that I do not consider such testimony competent in any law suit. I now answer by saying the object was to prevent, after the execution of the final release provided for in clause 6, any possible claim of any kind or description by the contractor against the United States.

10. Question. I will ask you to state whether or not you had any other or different intendment than the one above stated, with respect to the meaning and significance of the provision referred to?

Answer. None whatever.

11. Question. What care was exercised by you or by the members of the force under you, with relation to the preparation of the clause referred to; and what was the reason, if any, for making the same definite and certain with relation to the matters intended to be covered therein and thereby?

153 Answer. Probably there was consultation between me and the then existing Naval Advisory Board. If I remember right, Col. William B. Remey was Judge Advocate General of the Navy Department, and Mr. William Clarke was his ablest and most trusted clerk. I as Secretary, with them, I believe, prepared the sixteenth article of this contract for the Chicago, and the similar articles in the contracts for the Boston, Atlanta, and Dolphin, if they are contained therein. We prepared them with great care, to accomplish the purpose already stated of excluding any claims after the final payment and the release of all claims of any kind or description.

12. Question. If in doubt at all about the preparation of the various clauses entering into the agreement, and particularly the clause to which your especial attention has been called, what have you to say as to what was in your mind when the contract itself was signed, with reference to the meaning and purpose of that clause?

Answer. I am in no doubt, and I am quite sure that the care with which this clause was prepared grew out of my knowledge of claims of various sorts under contracts which had prior to that time been made with the department, which had been exceedingly troublesome to the department.

13. Question. Do you know whether or not the clause referred to was contained in other contracts for the building of other ships, or whether this was its first appearance; that is to say, in connection with the contracts or the construction of the ships you have named, ending with the Dolphin?

Answer. So far as I know, it was its first appearance; but I wish to speak guardedly as to the existence of public records. I do not remember any precedent from which we took this sixteenth article.

14. Question. Do you recall the dates of those contracts for the four ships that you have named?

Answer. They were made about July, 1883, after I had been in the department as Secretary a little over one year.

15. Question. If you had been drawing such a contract unaided or uncounseled at that time, relating to the same subject, I will ask

you to state what kind of claims or character of claims you would have endeavored and intended to cover in a clause calling for a final release; and if a final release were given and required, what kind of claims you would have endeavored and intended to cover in said release?

Mr. FAY: I object to the question upon the ground that it is utterly immaterial to the subject-matter of this suit, that it is improper as calling upon the witness to express his view about a contract which is not involved in the controversy, and is intended to show the intent that Secretary Tracy had in drawing a subsequent and different contract.

Answer. I would not have the slightest objection to opposing my opinion against that of Secretary Tracy; but, under the circumstances, I think I will decline to answer unless instructed to do so by the Court of Claims. If so instructed I will answer with pleasure. It draws largely upon the imagination.

Mr. COLLINS: I desire to offer in evidence a copy of the sixth clause of the sixteenth article of the contract for the construction of the Chicago, which has been called to the attention of Mr. Chandler, and will have the same duly authenticated by the department.

Mr. FAY: To which I object as incompetent.

154 The witness asks to have it appear, if such is the fact, that that same clause, namely, the sixth clause of the sixteenth article, was in the contracts for the Boston, Atlanta, and Dolphin.

Mr. COLLINS: Then I will offer at this time copies of the sixth clause of the sixteenth article in the four cases mentioned, the same to be duly authenticated by the Navy Department and attached to the deposition of this witness.

The witness is cross-examined by the counsel for the claimants, and testifies as follows:

By Mr. FAY:

16. Cross-question. Mr. Chandler, you have no knowledge whatever of the contracts entered into between the Cramp & Sons Ship and Engine Building Company and the United States when Mr. Tracy was Secretary of the Navy, for the building of the Massachusetts, have you, in 1890?

Answer. I have none in mind at this time and had none at the time, unless they came to my attention as a member of the Senate Committee on Naval Affairs.

17. Cross-question. I mean at the time of the execution of the contracts in 1890 you had knowledge of the details of the contract?

Answer. Probably not; none whatever unless something was called to my attention as a member of the Senate Naval Committee, where I gave very careful attention to what was going on in a general way, both in Congress and in the department.

18. Cross-question. You were a member of the Senate Committee on Naval Affairs for a number of years, were you not?

Answer. Yes; all the time from 1887 to 1901.

19. Cross-question. Along about 1896 do you remember claims presented to the Senate Naval Committee with respect to damages accruing to the Cramp Company for delays on the part of the Government in furnishing armor for the building of the Massachusetts and Indiana?

Mr. COLLINS: That is objected to as incompetent and irrelevant.

Answer. I have no present recollection. I might remember much upon an examination of the public records.

20. Cross-question. Were you acquainted with Mr. C. Eaton Creasy, of Washington?

Answer. Very well acquainted with him. He was my appointment clerk when I was Assistant Secretary of the Treasury in 1865.

21. Cross-question. While you were a member of the Senate Committee on Naval Affairs do you recollect Mr. Creasy presenting claims in behalf of the Cramp Company on these vessels?

Mr. COLLINS: That is objected to for the same reason as above.

Answer. Not distinctly now. I might remember as before stated.

22. Cross-question. Do you remember a provision in the naval appropriation bill of 1896, referring the claims of the Cramp Company to the Secretary of the Navy for a report?

Answer. I do not now remember it. I should be perfectly willing to look at any records of this sort and see if my memory is refreshed, and make any statement that is competent; or, whether competent or not, if required by the court.

23. Cross-question. For the purpose of refreshing your recollection, Mr. Chandler, I call your attention to House Document
155 No. 69, Fifty-fourth Congress, second session, December 11, 1896. I want to call your attention to the paragraph from the act making appropriations for the year ending June 30, 1897.

Answer. I now have a distinct general recollection on the subject.

24. Cross-question. The paper that I handed you is the report under that act. Do you have any present recollection of the result of that report; do you remember whether there was anything done under it or whether the committee acted upon that report?

Answer. I do not remember. The letter of the Secretary was referred, not to any naval committee, but to the Committee on Claims of the House.

25. Cross-question. A similar letter was addressed to the Senate, was it not? Do you remember whether that ever came before you in the Senate Naval Committee?

Answer. I do not remember.

26. Cross-question. While you were a Member of the Senate and a member of the Senate Naval Committee, do you recollect of any claims for damages arising from a breach of contract on the part of the Government in failing to furnish armor as they had agreed being reported favorably by your committee and that they passed Congress and were paid?

Mr. COLLINS: That is objected to as not proper cross-examination and as incompetent, immaterial, and irrelevant.

Answer. I do not remember such action. Possibly there was such action. I wish to say that I knew then, and know now, of no reason why contractors should not have gone or should not go to Congress for additional payments under conditions stated by Secretary Herbert in his letter to Congress, December 8, 1896, contained in House Document No. 69, Fifty-fourth Congress, secand session. A claim of that kind presented to Congress seems to me to have no relation whatever to the meaning of the contracts providing for a final release of all liability.

27. Cross-question. The Secretary of the Navy would not have been authorized, would he, Mr. Chandler, to have paid claims for unliquidated damages growing out of the faults of the United States in breach of contract?

Answer. If they properly arose under the contract, he would have been authorized to do so, I think.

28. Cross-question. For unliquidated damages?

Answer. I think so. If I was Secretary of the Navy and had a claim for unliquidated damages presented to me which was a legal liability or even a liability which would be entertained in a court of equity, I should have felt authorized to allow it under the contract, most certainly. But after a release had been made in the terms of these contracts, I should not have felt authorized to allow a dollar for any cause whatever. Congress might have awarded any sum it pleased for any reason.

29. Cross-question. In a case of this character, Mr. Chandler, if a claim arose which the Secretary had no jurisdiction to entertain or pay, would you consider, do you consider, or was it your intention that the contractor, in order to receive the balance of his contract price, was to be required, as a condition precedent to receiving the balance of his contract price, to waive any claim that the Secretary of the Navy had no jurisdiction to entertain?

156 Answer. Every possible claim or imaginable claim he waived when he received the final payment and executed his release, good claims and bad claims. Whether the Secretary had power to pay them or had not power to pay them, he waived them, retaining always his right to appeal to the generosity or the good will of Congress, which can do anything it likes with the public money.

30. Cross-question. Do you mean by that that he was obligated to sign such a release by the terms of his contract?

Answer. Exactly that I do mean, every possible claim. Let me read you the language. He was obliged to release "all claims of any kind or description under or by virtue of this contract."

31. Cross-question. And that, you think, includes any claim that arose by virtue of the breach of the contract?

Answer. Absolutely anything imaginable growing out of the substance of the transaction, the building of a ship for the Government by the contractor. That was the purpose of the clause, carefully designed and drawn up to protect the Government from any legal claim whatever, from anything except an appeal to the, so to speak, good will of Congress. That is what I meant to do with respect to those ships.

32. Cross-question. In other words, you meant to require the contractor to bear any loss brought about by the default of the Government?

Answer. No, not if he persisted in his claim in the proper way. But if he took the final payment and signed the release, yes.

33. Cross-question. Have you observed, Mr. Chandler, whether there was any very material difference in the subject matter of the contract entered into by Secretary Tracy for the Massachusetts and the contracts entered into by you for the Chicago?

Answer. Yes, I have.

34. Cross-question. What material difference in the subject matter did you observe?

Answer. I understand what you wish attention called to. My impression is that you desire to know whether I noticed that under the Tracy contracts for battleships the armor was to be furnished by the United States and not by the contractor.

35. Cross-question. Yes.

Answer. I think I am well aware of that fact and have noted that difference.

36. Cross-question. Did you observe the United States stipulated to furnish the armor at the times and in the order to carry on the work properly?

Answer. I think I noticed it at the time. I have no doubt that was the fact.

37. Cross-question. Under those circumstances, if the Government failed to carry out that provision of the contract and failed to furnish the armor in the time and in the order that they stipulated they would do, would you consider that any damages growing out of that failure were to be waived before the contract price was paid?

Answer. Unquestionably it would have been released like any other claim under the contract. The contractor should have refused to receive his final payment and to execute his release.

38. Cross-question. He should have refused to receive his final payment?

157 Answer. If we wished to make a contest and recover more than the Secretary was willing to allow for damages from delay in furnishing the armor, he should have refused to receive his final payment and execute his release.

39. Cross-question. He had covenanted to execute his release as a condition precedent to receiving his final payment. Now, was it your intent or would it have been your intent to have required him to waive that as a condition precedent to being paid for his work?

Answer. Unquestionably, if he wanted the last payment, he was obliged to. He should have declined to receive the last payment until he had made a final adjustment with the Secretary; and then, after his final effort to make a settlement with the Secretary, he should have decided whether to receive his final payment and execute the release. In other words, he could not execute a final release and continue to maintain any legal controversy with the Government, if I understand the English language, which I do not like to undertake to expound to a court.

The witness is requested to state whether he knows of any other

fact or matter which may be evidence for either party relative to the claim in question, and says: "I know of nothing except it may be the law books of the country."

WM. E. CHANDLER.

Deposition of Robert E. Logan, for Defendants, Taken at Washington, D. C., on the 20th Day of September, A. D. 1910.

Defendants' counsel, F. W. Collins, Esq.; claimants' counsel, John C. Fay, Esq.

ROBERT E. LOGAN, having been produced as a witness on behalf of the defendants, was by me sworn before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to said cause; and thereupon deposed and said that his name is Robert E. Logan; that his occupation is that of clerk, Navy Department; that he is 49 years of age; that his place of residence is Washington, D. C.; and that he has no interest, direct or indirect, in the claim which is the subject of inquiry in said cause; and that he is not related to the claimant.

And thereupon the said Robert E. Logan was examined by the counsel for the United States, and, in answer to interrogatories, testified as follows:

1. Question. Mr. Logan, what position do you hold in the Navy Department and how long have you held that position?

Answer. Clerk; since August 1, 1887.

2. Question. In what office have you been clerk?

Answer. In the Judge Advocate General's office until two years ago the first of July, at which time the office of the solicitor was established and I was transferred to that office.

3. Question. What have been the duties of your position?

Answer. General clerical work.

4. Question. Are you familiar with the procedure in your office with relation to the keeping of the files?

Answer. To some extent; yes.

158 5. Question. I am going to ask you what you know with reference to a certain memorandum of agreement relative to changes in the contract for the construction of seagoing battleship No. 3, and the correspondence relating to this agreement passing between Mr. Scott, of the Union Iron Works of San Francisco, and Mr. Tracey, then Secretary of the Navy, together with a memorandum slip.

Answer. Last week in the morning Mr. Naegle asked me to get the Oregon box and look through it and see if I could find a letter, of which he gave me the date, from the Union Iron Works addressed to the department and inclosing a memorandum relating to changes on the battleship No. 3. I got the box and went through it paper by paper and found the letter designated by Mr. Naegle.

6. Question. What else did you find?

Answer. And in this letter I found a memorandum placed therein by Mr. Donoho, at one time file clerk in the office of the Judge Advocate General.

7. Question. I call your attention to the letter of February 27, 1903, and ask you if that is the letter referred to by you?

Answer. That is the letter I found in the file box.

8. Question. I call your attention to this paper [indicating memorandum] and ask you where you found that?

Answer. That was inclosed in the letter from the Union Iron Works—the memorandum of agreement.

9. Question. I also call your attention to this slip, with the lead-pencil notation upon it, and ask you if that is the slip?

Answer. That is the slip I found with the letter referred to from the Union Iron Works inclosing the agreement.

10. Question. In whose handwriting did I understand you to state this was?

Answer. Mr. Donoho, the file clerk in the Judge Advocate General's office at that time.

11. Question. Where is Mr. Donoho now?

Answer. He is dead.

12. Question. When did he die, if you recall?

Answer. About ten years ago.

13. Question. How do you know that is his handwriting?

Answer. By being familiar with his handwriting, having been in the office with Mr. Donoho for about 10 or 12 years.

14. Question. Are you sufficiently familiar with the use and purpose of slips of this character to be able to inform the court as to what this slip means?

Answer. I am.

15. Question. Please state what it means.

Answer. A slip of this character is placed in the files when papers are taken therefrom. In this case it appears that Capt. Lemley, then Judge Advocate General, called from the files the letter of the Union Iron Works, dated February 27, 1893, inclosing the memorandum noted therein. These papers, according to this memorandum, were handed to Capt. Lemley for the information of Mr. Nixon.

16. Question. Have you any independent recollection of this matter; that is to say, the correspondence referred to and the memorandum of agreement also having been called to the attention of Mr. Nixon by Judge Advocate General Lemley?

Answer. I have not.

159 Mr. COLLINS: All the papers referred to are already attached to the deposition of Pickens Naegle, a witness called for the United States.

17. Question. What other and further correspondence connected with the Oregon transaction was there attached to or connected with the slip to which your attention has been called other than the letter of February 27, 1893, the memorandum of agreement relating to the changes in the contract for the construction of seagoing battle ship No. 3, and the memorandum of agreement?

Answer. Nothing.

Mr. FAY: I object to the form of the question, as putting words in Mr. Logan's mouth.

Mr. COLLINS: I offer this evidence for one purpose only, and that is to show that the memorandum of agreement made by and between the United States Government and the Union Iron Works at San Francisco was shown to Mr. Nixon for the Cramp Company, and for no other purpose.

Cross-examination by Mr. FAY:

1. Cross-question. Mr. Logan, you have no knowledge or recoldection of this matter except what you derived from this paper?
Answer. That is all; just from the memorandum.
2. Cross-question. You don't know whether the agreement ever was shown to Mr. Nixon, or not?
Answer. Sir?
3. Cross-question. You don't know whether the agreement ever was shown to Mr. Nixon, or not?
Answer. I do not know, sir.
4. Cross-question. All you know about the subject is the pencil memorandum, and finding the papers in the files?
Answer. Yes.
5. Cross-question. Who is the file clerk now?
Answer. We have no file clerk in our office. He is in the Secretary's office.
6. Cross-question. Are these papers in the Secretary's office or the Judge Advocate General's office?
Answer. In the solicitor's office.
7. Cross-question. A new office, is it not?
Answer. Yes, sir.
8. Cross-question. Where did they come from—the Judge Advocate General's office?
Answer. Formerly the files of the Judge Advocate General's office.
10. Cross-question. Not the Secretary's office?
Answer. Not the Secretary's office.
11. Cross-question. Are the papers referred to in the letter of February 27—Secretary's letter of February 18, and the Union Iron Works letter of the 9th—on file in the department?
Answer. Yes, sir.
12. Cross-question. Have you them with you?
Answer. I have.
13. Cross-question. Now, I ask Mr. Collins to allow me to see them?

Mr. COLLINS: Mr. Collins at this time declines to allow Mr. Fay to see these papers, for the reason that this whole matter with relation to the Oregon and its connection in this case has been introduced into the record by the claimants themselves, and now the Government's sole purpose in presenting proofs to the effect that an agree-
160 ment similar to that made between the Union Iron Works and the Government with respect to the Oregon was tendered to the claimant company, and for no other purpose, and simply to limit the discussion of this matter entirely to its legitimate field, and for no other purpose.

14. Cross-question. Mr. Logan, are you familiar with the way files were kept at that time?

Answer. I am; yes, sir.

15. Cross-question. Whenever a paper went out of the files, was a memorandum put in the files showing that that paper had been taken out?

Answer. Yes, sir; it was customary always.

16. Cross-question. When the paper was returned to the files, was that memorandum destroyed?

Answer. As a general thing, yes.

17. Cross-question. And this seemed to have escaped destruction?

Answer. Yes, sir; you can find them in the files all through now.

18. Cross-question. Can you tell me whether in putting the date in figures, the month or the day comes first. In other words, I will put it this way: 5/2/94. Can you tell me whether that means the 5th of February, 1894, or the 2d of May, 1894?

Answer. The 2d of May, 1894. I might say it indicates to me the 2d of May, 1894.

19. Cross-question. It is done both ways, is it not.

Answer. I could not say as to that. I think over there they put the month and the day of the month and the year.

Redirect examination by Mr. COLLINS:

1. Redirect question. What does this "Le" mean? That is to say, it is an abbreviation of what?

Answer. Abbreviation of Lemley.

2. Redirect question. Did you ever see that before on any other of the memorandums?

Answer. I have.

3. Redirect question. Made by this man—this file clerk?

Answer. Yes, sir; that file clerk.

4. Redirect question. I want to know whether or not that was his customary way of abbreviating Capt. Lemley's name?

Answer. It was his customary way. It was customary in the office of the Judge Advocate General at that time in assigning the mail to mark "Le" for Lemley, "Lo" for Logan, "N" for Naegle, "Ha" for Hanna, and "K" for Kelsey, etc.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do, to state it, says: "No, nothing."

ROBERT E. LOGAN.

Deposition of William H. Stayton, for Defendants, Taken at Washington, D. C., on the 6th Day of September, A. D. 1910.

Defendants' counsel, F. W. Collins, Esq.; claimant's counsel, John C. Fay, Esq.

WILLIAM H. STAYTON, having been produced as a witness on behalf of the United States, was by me sworn, before any ques-
161 tions were put to him, to tell the truth, the whole truth, and nothing but the truth, relative to the said cause; and there-

upon deposed and said that his name is William H. Stayton; that his occupation is that of lawyer; that he is 49 years of age; that his place of residence is New York; that he has no interest direct, or indirect, in the claim which is the subject of inquiry in said cause; and that he is not related to the claimant.

And thereupon the said William H. Stayton was examined by the counsel for the United States, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. COLLINS:

Mr. COLLINS: Without waiving objections heretofore made to the competency and admissibility of testimony endeavoring to explain or interpret or to vary the terms of the contract in suit, the same having been fully executed by the parties and adjudicated in the courts, in view of the recent order of the court remanding this case for additional argument on law points and giving both parties the right to take further testimony, counsel for the Government offers the following testimony:

1. Question. Mr. Stayton, be kind enough to state your education and occupations.

Answer. I went to the Naval Academy in 1877; was graduated in 1881 as a line officer, and remained in the service until 1890. I then resigned and have since been practicing law in New York City.

2. Question. While you were in the Navy Department what positions did you fill and what duties thereunder did you perform?

Answer. I was on duty in the Navy Department from about February, 1887, to about July 1, 1890, as an assistant in the office of the Judge Advocate General. For the first few months my duty concerned courts-martial and contracts, and the same was true for the last six months. For the intermediate months my time was almost entirely taken up with contract matters.

3. Question. Who was the Judge Advocate General during this period?

Answer. Colonel Remey.

4. Question. What class or kind of contracts were you called upon to work upon?

Answer. Practically all contracts for large purchases of supplies, such as machines, tools, gun forgings, contracts for the erection of buildings, for the purchase of engines, and the construction of vessels.

5. Question. With what contracts for the construction of vessels did you have to do, to the best of your present recollection?

Answer. So far as I can now recall, with the Newark, Charlestown, San Francisco, Baltimore, Philadelphia, Concord, Bennington, Petrel, and New York. In the latter case only the general statement of provisions to be included in the contract.

6. Question. What, if anything, did you have to do with the preparations for the drawing of the contract in the case of the Massachusetts, or the drawing of the contract itself?

Answer. My recollection is that the Indiana, Massachusetts, and Oregon were constructed under the same appropriation, and that I

prepared the advertisement, proposal, and general form of contract, but resigned before the matter had gone further.

162 7. Question. Do you recall at this time whether or not in the proposed form of contract which was prepared by you there was included a clause therein calling for the furnishing by the contractor of a final release upon the making by him or it of the final payment?

Mr. FAY: I object to the form of the question as leading, and for the further reason that the proposal or the form of contract or the advertisements are matters of record in the Navy Department and the best evidence of their contents.

Answer. Such a clause was included.

8. Question. I desire to call your attention at this time to the 6th clause of paragraph 19 of the contract in the Massachusetts case, the same being found on page 28 of the printed petition, and ask you to examine the same with care and state whether or not that clause or one similar in terms and provisions was included in the recommendation made by you of which you have spoken?

Mr. FAY: Same objection as before.

Answer. Substantially, that clause was included in every vessel contract on which I worked.

9. Question. If there was any material or substantial difference between the phraseology or terms of the clause recommended by you to the department at the time of which you have spoken and the clause on page 28 of the printed petition to which I have called your attention, what was that change or that difference?

Mr. FAY: Objected to for the reason that the best evidence is a comparison of the two papers, not the memory of the witness.

Answer. In some cases we spoke of reserve funds; in others of the special reserve, and in other cases of the withheld percentages. Except for these changes the clause on page 28 of the petition seems to me to be identical with the clause recommended to the department.

10. Question. I will ask you to state whether in your mind and meaning as being responsible for the provision as recommended to the Navy Department in the first instance and in comparison with clause No. 6 in the contract as finally adopted and executed, there was any essential difference?

Mr. FAY: Objected to as incompetent.

Answer. There was none.

11. Question. Now, I will ask you to state, if you know, what became of the original drafts to which you have referred of the advertisement and the proposed form of contract?

Answer. So far as I know, they were all destroyed after the galley proofs were read.

12. Question. I will ask you to state if there had been any material or essential or substantial change in the clause above spoken of after the same was recommended by you to the department and at

the time that it was incorporated in the contract, whether or not you would have noticed such change and remembered such change?

Mr. FAY: Objected to.

Answer. Undoubtedly.

13. Question. Why?

Answer. It was my duty to follow the contracts up from the original general statement of provisions which always went out in company with the advertisement and to compare these forms, clause by clause, with the contract as finally executed. Col. Remey, to whom it was my duty to recommend directly, was a very painstaking, careful man, who himself read the contracts over repeatedly and
163 who held his assistants to a very rigid performance of duty. Had I made a mistake while I was his subordinate, I would not have been likely to forget it.

14. Question. Please describe the methods of Col. Remey with relation to the provisions of the contract. That is to say, his method of work.

It appears in evidence that Col. Remey is dead.

Answer. So far as I can recall, in every case of a ship contract Col. Remey would take several hundred slips of papers; he would have before him two desks or tables; he would start by saying, desk No. 1 will contain what the contractor is to do; desk No. 2 what the Government is to do. Then he would ask himself the question "What does the contractor do?" and would answer "Build the ship" or something to that effect. He would write this sentence on one of the slips of paper and place it on desk No. 1. He would then ask himself the questions—how, when, where—and would answer each of the questions. For instance, after saying "how" he would write down "according to plans and specifications." After saying "when" he would write down "beginning such a date and ending such a date." After "where" he would put the name of the yard. The colonel would then ask such questions as "suppose they do," "suppose they don't," and would write on his paper what was to be done in each case. For instance, opposite the paper saying "build the ship," he would have one paper saying "they don't" and he would ask as before concerning that paper the various questions—how, when, why. He would write opposite the cause, or what he considered the possible causes of failure. For instance, fire, receivership, etc., and would then ask what course the department should take in each matter. These various papers would then be pinned in order on larger sheets and his assistants in the contract department would be ordered to draw the form of contract embracing all of the ideas on these various paper slips. At first a Mr. Clark and myself had this duty of drawing the form of contract to embody Col. Remey's ideas as embraced on the slips. Later Mr. Clark left the department and that duty became mine.

15. Question. What has become of Mr. Clark, if you know?

Answer. Mr. Clark is now dead.

(Witness continues:) After drawing the form it was submitted to

Col. Remey and was usually gone over at nights at his house until it was in form to satisfy him. In some cases I know the form was submitted to the Secretary of the Navy. In other cases I don't know whether the colonel submitted it or passed on it finally himself.

16. Question. Are you acquainted with Lewis Nixon?

Answer. Very well.

17. Question. Did you know him when he was connected with the Navy Department?

Answer. Yes, sir.

18. Question. What, if anything, to your knowledge, did Mr. Nixon have to do with the preparation of the contract in suit? I refer now to that of the Massachusetts case to which your attention has just been challenged.

Mr. FAY: Objected to for the reason that the witness has already testified that he left the department six months before this contract was made.

164 Mr. COLLINS: I will confine the question, and ask the witness, of course, to confine his answer to the time in which he was in the Navy Department.

Mr. FAY: Further objected to. The witness is not testifying that he had anything to do with the preparation of the advertisement as made for the Massachusetts.

Answer. My impression is that I testified that I superintended the preparation of the advertisement, the form of proposal, and the general statement of provisions to be included in the contract for the Massachusetts. At any rate, such is the fact, but I do not think the appropriation became available until July, 1890. Offhand, I think I left the department on the last day of June and that the advertisement was issued on the first day of July of that year. I did not prepare all of the papers in the case of the Massachusetts, as I had in the case of prior vessels, because I was absent from the office for one or two months in the spring of 1890, returning about the first of May, and part of these papers were prepared by Mr. Neagle, who was meantime assisting in the contract department and preparing to relieve me of that duty on the acceptance of my resignation. So far as I know, Mr. Nixon was not consulted prior to the first of July. I can remember going to his office and asking him to show me the plans of the ship because he was being very highly commended for the excellent work he had done in the designs. He showed me these plans, but I did not mention contract to him and have never heard of his taking any part in the matter.

19. Question. What part in the matter would fall to the lot of a naval constructor in the department? Please define in your answer the different duties of the various departments with relation to the preparation of the various provisions that entered into this contract.

Answer. After the appropriation was made the bureaus would be instructed to prepare plans and specifications covering the parts of the vessel that came under the respective bureaus. These included the Bureau of Construction, that of Engineering, of Equip-

ment, and of Ordnance. After these four sets of specifications were received, complete copies of them would be furnished to all four of the bureaus, who would be instructed to read them over and find whether there was any conflict, as it sometimes happened that two or more bureaus claimed authority over the same part of the vessel or machinery. After the specifications had been amended so that all of the bureaus agreed that there were no duplications or inconsistencies, the forms of advertisement, proposal, and general contract terms were prepared. These were sent to the bureaus, which were again requested to report whether anything in these last papers was inconsistent with the specifications. On the receipt of their replies the papers were prepared for publication. I can not recall any incident in which the proposal or contract contained anything at variance with the specifications, consequently on that point I never consulted with Mr. Nixon, but I did see him occasionally concerning inconsistencies between the specifications of various bureaus.

20. Question. Who was charged with the responsibility for the preparation of the contract itself and the legal phraseology thereof?

Answer. Col. Remey was directly responsible to the Secretary, and for about two years I was directly and solely responsible to Col. Remey.

165 21. Question. How many ship contracts, or about how many within your knowledge, contained the provision or one essentially the same to which your attention has been called. I mean clause 6, paragraph 19, of the contract in suit?

Answer. All of the ship contracts with which I had anything to do contained substantially that clause. About a dozen, I should say, in all.

22. Question. And how many of these antedated the contract in suit, that being for the Massachusetts?

Answer. All except the general statement which was to cover the three battle ships of the Massachusetts class.

23. Question. And all of them contained this clause?

Answer. They did.

24. Question. While you were there, what conversations, if any, did you have with the Secretary of the Navy with relation to the preparation of the contract or the recommendations of which you have spoken for the contract?

Answer. On two occasions Col. Remey took the proposed forms of contract to Mr. Whitney, who was then Secretary, and had me present to take part in the conference. I do not recall that I ever had ship contract matters up before the Secretary except in these two instances.

25. Question. How about Mr. Tracey. Did you have conversations with him with reference to these contracts?

Answer. It was my duty frequently to take the mail and papers to Mr. Tracey for signature at the close of the day, but I don't think he ever took up in any detail the matter of ship contracts, as the forms had been fairly well established before Mr. Tracey became Secretary, and if Col. Remey ever took the matter up with Mr. Tracey I never knew of it.

26. Question. I will ask you to state what was in your mind when you prepared and presented clause 6 of paragraph 19 of the contract with reference to its purview and its purpose?

Mr. FAY: Objected to as utterly incompetent and inadmissible.

Answer. Substantially that clause was copied from the contracts for the Chicago and Boston. It was intended to provide for a certain and fixed period at which the contractor should receive all that was ever to come to him, and the Government was to receive a release from all claims that might ever be made. I can recall only one occasion in which I was brought definitely to think of the exact meaning of this clause after it had been originally put into the contracts. On one occasion some contractor requested the department to organize a board composed partly of officers and partly of civilians who were to pass upon questions of changes and of compensation. This contemplated a change in the prior policy of having such boards composed entirely of naval officers. This matter was taken up at one of the conferences with Mr. Whitney, who declined to consent on the ground that civilians over whom he had no control might make changes involving more than the appropriation for the ship, and at that conference Mr. Whitney instructed me to examine carefully the contract to see that nobody had power to overrun the appropriation. This necessarily involved a careful consideration of the meaning of the clause to which your question refers.

Mr. FAY: Answer objected to for the same reason.

166 27. Question. Mr. Stayton, I desire to put a question to you in the same words as put by claimants' counsel to Gen. Tracey when he was upon the stand, taking into consideration the fact that you have not testified that you were present at the time of the execution of the contract, but simply that you prepared the clauses of the contract, and particularly the clause to which your attention has been called, calling for the final release. With that difference, I desire to put the exact question. I would inquire whether, at the time of the execution of the contract on behalf of the United States, what claims you understood were to be covered by the final release?

Answer. I understood the clause to mean what was said in it—that it released all claims of any kind or description. I had no mental reservations.

28. Question. To your knowledge, what other different understanding or interpretation did Col. Remey or the Navy Department, so far as your connection with the same is concerned, have of the contract, and particularly the clause to which your attention has been referred?

Answer. Never any other interpretation, to the best of my knowledge and belief.

29. Question. What position were you in to know what was going on in Col. Remey's mind with relation to the provisions of the contract?

Mr. FAY: Same objection.

Answer. I had been selected by Col. Remey as his assistant. He told me that he would like me to succeed to the office when he left it. I was in his corps. He gave me his personal friendship and I spent many hours of the day locked in his private office and a great many more hours of the night at his house, where together we worked out the general scheme of these contracts and discussed in great detail the language of the various clauses. Col. Remey was a man who felt deeply the responsibility for every penny of money to be expended by the Government, and these contracts, involving many millions and the building up of the new Navy, were a very frequent source of conversation between him and myself. I believe I had his full confidence and affection, as I know he had mine, and I am unable to conceive that we concealed from each other reservations concerning the meanings of these clauses.

30. Question. I desire to put another question to you, Mr. Stayton, in the exact language of a question put to Mr. Tracey when he was upon the stand, being question 10, on page 3 of Gen. Tracey's testimony: If during the building of this vessel the United States had been in default in the performance of its part of the contract and in furnishing the armor and protracting the time for finishing the vessel, causing expense for the maintenance and insurance for the preservation of the vessel, please state whether or not it was your understanding or intention that such final release was or was not intended to cover claims of this character?

Answer. In my opinion all the contingencies you have mentioned were covered by and included in the contract price. The law absolutely forbade us to go beyond the appropriation or to leave any open clauses which would permit of claims in excess of appropriations for the building of the vessel. Necessarily, therefore, I contemplated no such contingency as extra claims of the kind to which
167 you refer, and regarded the general release as being an absolute end of all matters between the two parties.

31. Question. I will ask you to state if any other or different idea or intendment had been in the mind of Col. Remey with reference to the contract you would or would not have known it?

Answer. I believe I would. As a matter of fact, I believe he never had any such ideas.

32. Question. Now, you have referred to the understanding which you had and which Col. Remey had and the department, so far as you are able to speak for it, of the meaning of clause 6 of paragraph 19 of the contract. What construction did the department from time to time place upon that clause, to your knowledge? Please give any instances which may now occur to you in which the department had had occasion to consider the clause referred to.

Mr. FAY: Objected to as not the best evidence of the action of the department—the memory of this witness.

Answer. It is difficult to fix dates. My recollection is that once, before I left the department, an application was made for an extension of time for the construction of one of the ships. A second occasion also arose, but I think that was after my resignation. I was

calling on Col. Remey personally and he brought the matter up because it concerned a contract I had made. In both of these cases the decision of the department was that they might waive the per diem penalties, and, as I recall it, that they could go no further. I do not recall any other interpretation put on this clause until after I left the department.

33. Question. Calling your attention to a copy of a communication which I will have certified and authenticated, purporting to come from the Secretary of the Navy and to be addressed to the Chief of the Bureau of Construction and Repair and Steam Engineering, and relating to the Machias, I will ask you to state if that letter recalls to your mind one of these cases to which you have just referred.

Answer. This letter appears to have been written after I left the department and I don't know of it. My impression is, although I am quite uncertain, that the two cases concerned, gunboat No. 1 and cruiser No. 1, both arose from an application for extension of time.

34. Question. When it came to the preparation of the final release which accompanied and was a condition precedent of final payment in these cases, upon whom did the duty fall to prepare this final release?

Answer. I can not positively recall that any actual release was prepared or used while I was in the department. A form of release for future use was drawn by Mr. Clark and myself jointly, the bulk of the work being Mr. Clark's, and this was deposited with the forms of contract and other office papers ready for use when the contingency arose.

35. Question. I desire to call your attention to a copy of a form of release which is attached to the Government's motion to dismiss the petition in the case at bar, and the other cases of like nature which are included in the motion, and ask you to examine the same very carefully and state whether or not the form of release to which you have just referred conforms to the form of release to which
168 your attention is now called, of course eliminating therefrom the consideration of the particular ship in question, the date, etc.

Answer. So far as I can remember, the part of the release from the words "Now, therefore," in the last paragraph but one and down to the end of the paper are identical with the form prepared by Mr. Clark and myself, which form was put with papers relating to cruiser No. 1.

36. Question. I will ask you to state whether in the preparation of the form of release, in which as I understand it you collaborated with Mr. Clark, you had in mind any other or different purpose than carrying out the provisions of the contract as therein expressed, and particularly that provision of the contract calling for a final release.

Answer. I had no other idea than to close the matter according to my understanding of the meaning of the contract, as I have heretofore stated it.

Cross-examination by Mr. FAY:

1. Cross-question. You graduated at the Naval Academy in 1881?
Answer. Yes, sir.

2. Cross-question. And your rank then was?
Answer. Cadet midshipman.
3. Cross-question. What was your first duty?
Answer. I served two years at sea as cadet midshipman.
4. Cross-question. And then?
Answer. Then on final examination was transferred to the Marine Corps as second lieutenant. Served at the New York Yard; then on the flagship at the Pacific Station; then at Marine Barracks, Washington, and then in the Navy Department until the acceptance of my resignation.
5. Cross-question. What was your rank when you were assigned to the Navy Department?
Answer. Second lieutenant in the Marine Corps.
6. Cross-question. What date were you assigned there?
Answer. About February, 1887.
7. Cross-question. And you remained there from 1887 to 1890. You were three years then in the Navy Department?
Answer. I was.
8. Cross-question. And on duty in what bureau?
Answer. Judge Advocate General's office.
9. Cross-question. That was your first acquaintance with Col. Remey, was it?
Answer. No, sir.
10. Cross-question. When did you and he become acquainted?
Answer. I do not recall. I had been shipmates with his brother and had seen him a number of times.
11. Cross-question. He was a captain in the Marine Corps, was he not?
Answer. Yes, sir.
12. Cross-question. He was never at sea with you; you were never in his company?
Answer. No, sir.
13. Cross-question. Never belonged to the company that he commanded in the Marine Corps?
Answer. Never.
14. Cross-question. Can you tell when you got acquainted with him?
169 Answer. No.
15. Cross-question. Did you know him before you went to the Navy Department?
Answer. Yes, sir.
16. Cross-question. Where did this intimacy of yours develop?
Answer. At the Navy Department.
17. Cross-question. What time in 1887 did you go there?
Answer. About February.
18. Cross-question. Went there in February, 1887, and left there in July, 1890?
Answer. About.
19. Cross-question. About when in July, 1890?
Answer. The last of June, I think.
20. Cross-question. The last day of June?

Answer. I think.

21. Cross-question. Did you ever study law?

Answer. Yes.

22. Cross-question. When?

Answer. I am not sure whether I was at the law school when I went to Col. Remey's office, or whether I took it up afterwards.

23. Cross-question. What law school did you attend?

Answer. Columbian.

24. Cross-question. In the District?

Answer. In the District. But for three years before going to his office I had been squadron judge advocate in the Pacific.

25. Cross-question. I asked you what law school you attended.

Answer. You asked me when I studied law, and I answered that I studied in the Pacific when I was squadron judge advocate, and later at the law school.

26. Cross-question. What time did you enter the law school? At what date?

Answer. I am not sure whether it was in the spring or fall of 1887. My impression is that it was in the fall of 1887 and that I was graduated in the spring of 1890.

27. Cross-question. When were you admitted to the bar?

Answer. In the spring of 1891 in New York.

28. Cross-question. You were not admitted to the District of Columbia bar, then?

Answer. No, sir.

29. Cross-question. When did you commence to practice law?

Answer. I was in a law office in New York from the first of July, 1890, and started practicing for myself, I think, the first of July, 1891.

30. Cross-question. On being assigned to duty in Col. Remey's office, you were immediately given in charge of the preparation of legal papers?

Answer. For the first few months my duties were largely with court-martial cases and partly with contract cases under collaboration with Mr. Clark.

31. Cross-question. Was Mr. Clark a lawyer ?

Answer. He was.

32. Cross-question. And when did he leave there?

Answer. I should think about the end of 1887.

33. Cross-question. So you were with him nine or ten months?

Answer. Something like that; yes, sir.

170 34. Cross-question. During Secretary Whitney's time?

Answer. Yes, sir.

35. Cross-question. What vessels were being contracted for during the time that you were in there—in the Judge Advocate General's office?

Answer. The Newark, Charleston, Baltimore, Philadelphia, San Francisco, Yorktown, Petrel, Bennington, Concord, New York, Machias, and Castine, but I am not sure that the contracts for the last three vessels had been completed when I left the department.

36. Cross-question. Which of those were contracted for under Secretary Whitney, and which under Secretary Tracey?

Answer. The first nine, I think, under Mr. Whitney; the last three, I think, under Mr. Tracey.

37. Cross-question. Between 1887 and 1889, when Mr. Whitney went out, you think nine vessels were contracted for?

Answer. I think so; yes.

38. Cross-question. The last three you are not sure were contracted for during your time of service?

Answer. I am not sure. I know that I worked on the papers, but I am not sure of the state to which they had gotten, though I am reasonably sure in the case of the New York that a contract had not been signed.

39. Cross-question. All the legal knowledge that you had when you went into the Navy Department was what you had derived from your experience as judge advocate general of the naval court-martial?

Answer. No.

40. Cross-question. Had you ever devoted yourself to the study of the law?

Answer. For three years, in the Pacific, I had studied law with fair persistency.

41. Cross-question. Under any instruction or just studied yourself?

Answer. Merely from the books. I had no instructor.

42. Cross-question. What line of practice are you now engaged in, Mr. Stayton?

Answer. A general practice.

43. Cross-question. Do you mean in the trial of cases or in the preparation of office business?

Answer. Both, but more largely office business.

44. Cross-question. Business before the Navy Department? Does your business run in that direction?

Answer. I was attorney for one or two—perhaps more—officers who were court-martialed 10 or 15 years ago. I do not think I have had any business before the department for at least 15 years.

45. Cross-question. Do you practice there now?

Answer. No; I do not practice before the departments.

46. Cross-question. Do you represent any claims before the Navy Department, before the Judge Advocate General's office?

Answer. Never.

47. Cross-question. When was this matter brought to your attention that you are testifying about?

Answer. About 10 days ago.

48. Cross-question. By whom?

Answer. Mr. Collins.

171 49. Cross-question. Have you had any opportunity to go over the records of the department to refresh your recollection?

Answer. I spent two hours at the department this morning, of which probably one-half were spent in examining records and the other half in consultation with Mr. Collins and Mr. Neagle.

50. Cross-question. Do you wish to be understood that you drafted the particular clause 6 of article 19; that you personally drafted and prepared that clause?

Answer. I personally copied it from the Chicago contract and personally adapted it to the circumstances of the new vessels as contracts were made.

51. Cross-question. You personally copied it for the purpose of inserting it in the advertisements. Did you not?

Answer. In the general statement which went with the advertisements. Strictly speaking, not a part of the advertisement, but a paper referred to in the advertisement which bidders might get on application to the department.

52. Cross-question. It was not printed as part of the advertisement?

Answer. No; we had a comparatively small appropriation for advertising and we issued therefore——

53. Cross-question. I do not care for the argument, just explain——

Answer. We had a comparatively small appropriation for advertising. We therefore issued brief advertisements referring to forms of proposal and general statements of provisions to be included in the contract and to the plans and specifications, which prospective bidders might get on application.

54. Cross-question. What you have said relates generally but not specifically to this case, does it not?

Answer. I do not understand exactly what you mean, sir by this case.

55. Cross-question. You are giving the general course of business in the department, aren't you?

Answer. Yes, sir.

56. Cross-question. Now, I want to draw your attention to this particular individual case. Can you segregate that from the general run of cases? Have you any special recollection of this particular case?

Answer. You mean the case of the Massachusetts?

57. Cross-question. Yes.

Answer. I recall preparing some papers for use in the case of the three battleships of the Massachusetts class. I recall that I did not finish those papers, as I was sent to New York on a court-martial case. That when I returned I again did some work on these papers, but that they were not definitely issued, and I can not say were in final form when I left the department.

58. Cross-question. Have you any recollection of any other provision in the contract for the building of the Massachusetts aside from this clause 6 of article 19?

Answer. Yes.

59. Cross-question. Can you give briefly what you recollect about the first article?

Answer. I do not recall the articles in order. There were clauses providing that the ship should be constructed in accordance with the

plans and specifications; providing for the date on which she
172 should be begun and completed; providing for the amount of payment and the number of partial payments——

60. Cross-question. You have answered my question, Mr. Stayton. Who prepared the contract for the Chicago?

Answer. I do not know, sir. That was before I went to the department.

61. Cross-question. And was that release provision in contracts anterior to that—way back?

Answer. I do not recall tracing it further back than the Chicago.

62. Cross-question. Did you ever try?

Answer. Nor try.

63. Cross-question. So that you were not the author of that provision?

Answer. I was not.

64. Cross-question. Now, you speak about the department on some occasion having construed the meaning of that provision. Do you recollect any occasion where they construed it during your service there?

Answer. My impression is that in the case of the Yorktown it was construed during my service.

65. Cross-question. What was the question that arose under this provision of the contract in the Yorktown?

Answer. To what relief should a contractor be entitled who was delayed in the construction of a vessel by the fault of the Government.

66. Cross-question. That was the question that you think came up?

Answer. Yes, sir.

67. Cross-question. And that was in the case of the Yorktown?

Answer. I think in the Yorktown and the Newark.

68. Cross-question. You think in both those instances the Newark and the Yorktown were delayed in their building by the fault of the Government?

Answer. Yes, sir.

69. Cross-question. And they sought relief?

Answer. I think so; yes, sir.

70. Cross-question. That is, damages for delay?

Answer. Yes, sir.

71. Cross-question. It is your recollection that that came up during your term of service?

Answer. In the case of the Yorktown, yes; in the case of the Newark I think it was after.

72. Cross-question. Had it not been uniformly held for years that the department had no jurisdiction to entertain damages for delay?

Answer. No; I am not aware of such a holding.

73. Cross-question. Unliquidated damages?

Answer. I am not aware of such a holding.

74. Cross-question. Are you not aware that it had been the universal decision both of the Attorneys General and the Secretaries of

the Navy for a long series of years to hold that the Navy Department had no jurisdiction to entertain a claim for unliquidated damages?

Answer. No; I am not aware of it.

75. Cross-question. You never heard of that during your service in the Navy Department?

Answer. Not in the way in which you state it; never.

76. Cross-question. You never did?

Answer. Never.

173 77. Cross-question. Ever heard of it since you went out?

Answer. Never—in the way you state it.

78. Cross-question. If you merely copied into contracts—that you had something to do with the preparation of—this clause, it was not the subject of any particular discussion, was it?

Answer. Yes; it happened that that clause had to be modified to fit each particular case because the retained percentages varied from ship to ship.

79. Cross-question. You mean in amounts?

Answer. In amounts and names and purposes for which they were to be retained.

80. Cross-question. What has that got to do with the final release?

Answer. The clause relating to the final release provides, first, for payment by the Government of the amounts due and, second, for the simultaneous release by the contractor.

81. Cross-question. Now, look at the sixth clause of the nineteenth paragraph and tell me what modification had to be made between that one and the Chicago.

Answer. As I recall it, the Chicago did not have a special reserve or a special fund, and hence the clause in so far as it relates to these matters had to be modified.

82. Cross-question. What was the language in the Chicago case?

Answer. My recollection is that the retained percentages were to be paid on the execution of the final release.

83. Cross-question. The retained percentages?

Answer. That is my recollection.

84. Cross-question. Then you think you changed the words "retained percentages," and inserted the words "special reserve."

Answer. Yes; we made just such changes in most cases.

85. Cross-question. Was the language "or the surplus, if any, of the said retained percentages"?

Answer. Substantially that language was used in the case of the Chicago, as I recollect it.

86. Cross-question. When did the question of special reserve come up?

Answer. I think that arose first in the case of the Massachusetts class.

87. Cross-question. Did not appear in the New York?

Answer. The New York contract was not completed when I left the department and I am not sure.

87½. Cross-question. In the vessels that you have mentioned where you had to do with the preparation of the contract, in any of

those cases was the Government to furnish any part of the materials or was the vessel to be built entirely by the contractor?

Answer. I think the battleships of the Massachusetts class were the first in which any parts were furnished by Government.

88. Cross-question. Then your answer is that the vessels that you had the preparation of the contracts in, in no instance were vessels where the Government furnished part of the material?

Answer. Yes. Except that I prepared part of the papers relating to the general conditions to be included in the Massachusetts contract, and hence had something to do with the preparation of the contract which did provide that the armor should be furnished by the Government.

174 89. Cross-question. In the case of the Chicago no materials were provided by the Government, were there?

Answer. I think not. I did not have anything to do with making that contract.

90. Cross-question. In the Newark?

Answer. In the case of the Newark and all of the other vessels that I have named, I think that the Government had nothing to do with furnishing materials.

91. Cross-question. Then, of course, there was no stipulation in those contracts that bound the Government to furnish materials on or before a certain date?

Answer. No, sir; none except in the case of the Massachusetts.

92. Cross-question. When you came to prepare a contract that had an obligation requiring the Government to furnish material in the time and in the order to carry on the work properly, why didn't you change the provision for form of final release from such a form as was adaptable to a case where the Government furnished no material?

Answer. I did not draw that contract, but I think the form applicable, and the contractor may properly assume the responsibility if he so desires.

93. Cross-question. Yes; but where the contract in words puts that responsibility on the United States, and the United States obligates itself to furnish within the times and in the order to carry on the work properly, why do you assume or say that the contractor should bear the loss of the breach of that part of the Government's contract?

Answer. If he knows in advance that he must assume that responsibility he will fix his price accordingly and receive pay for taking up that responsibility.

94. Cross-question. You think he can say in advance what damage would occur by reason of that?

Answer. If he has ever done any work for the Government, he will know that some damage is liable to occur, because he knows that much Government work is the subject of long experiment.

95. Cross-question. Have you read this contract in full?

Answer. I have not read any part of it, sir; except the part that was pointed out to me by counsel.

96. Cross-question. Did you know of the provision that I have just spoken about?

Answer. I recall that in the preparation of the general provision of the contracts of the vessels of the Massachusetts type I was sent by Col. Remey to consult with Commander Folger about the furnishing of the armor, and that there was consultation as to what sort of a clause should go in the contract to cover this point. I reported the result of my interview, but I do not think that I was present when the final form of the paragraph was agreed upon.

97. Cross-question. Do you recollect any provision in that contract which shows that the contractor was not to assume any losses by reason of the Government's default?

Answer. No. The contract was incomplete when I left it, but I remember no such clause.

98. Cross-question. You would not be able to say whether there was such a clause or not?

Answer. No, sir.

175 99. Cross-question. With your limited knowledge of what the contract contains, why are you so positive as to what you think the meaning of the sixth clause of the nineteenth paragraph is?

Answer. I have testified only as to the meaning of the sixth clause in cases where I drafted and as to the idea I intended that language to convey.

100. Cross-question. Then you do not intend to testify that at the time this contract of the Massachusetts was executed you had in mind the meaning with respect to that clause of this particular contract?

Answer. I do not know when the Massachusetts contract was executed, and mean merely to testify as to the interpretation placed on the clause by the department up to July, 1890.

101. Cross-question. And you had never had anything to do with the final contract of any vessel where the Government furnished part of the material?

Answer. Final contract—no.

102. Cross-question. Did Mr. Tracey consult with you on questions of law, ever?

Answer. Yes. I was frequently required to report to Mr. Tracey concerning matters involving law and fact, which matters were in the Judge Advocate General's office.

103. Cross-question. I do not refer to some routine business. I ask if he ever conferred with you.

Answer. I am quite sure that Mr. Tracey never asked my opinion as to what the law was in any matter, except on one occasion when I was required to examine the law and report to him concerning the organization of the Bureau of Navigation and Hydrographic Office.

104. Cross-question. Mr. Nixon was the designer of these vessels, was he not?

Answer. I think so.

105. Cross-question. And he was the technical expert in the preparation of the contracts?

Answer. So far as I know, he was not.

106. Cross-question. So far as you know, he was not?

Answer. He was not. I have no knowledge of Mr. Nixon ever having been consulted about a contract. If that was done, it was without my knowledge.

107. Cross-question. You don't mean to say that he was not consulted; you simply mean to say that you don't know whether he was or not?

Answer. I never consulted him.

108. Cross-question. He has testified that he was consulted. I want to ascertain from your testimony whether you mean to testify that he was not consulted. Your answer is framed with a double meaning.

Answer. I have no intention of so testifying.

109. Cross-question. Mr. Collins read you a question that was asked Gen. Tracey. In view of the fact that you were not in the Government service when this contract was executed, I want to ascertain from you what you meant by your answer as to what was in your mind as to the meaning of the sixth clause of the nineteenth article at the time the contract was executed.

176 Answer. Mr. Collins in his question to me concerning that matter specifically stated that I was to consider the question so modified that I was not to answer it as having reference to my thoughts at the time the contract was executed, but instead I was to answer it as to what was in my mind at the time I drew the preliminary drafts which were issued with the advertisement as the general form of contract which would be required in the case of the Massachusetts.

110. Cross-question. That would be that if you had been in the employ of the Government at the time this contract was executed, that would have been your intention?

Answer. I think it would.

111. Cross-question. Not having been, you don't know what it would be?

Answer. I think I do.

112. Cross-question. And this is irrespective of the fact that you were dealing with a contract that was absolutely different from any other contract that you had ever had to do with?

Answer. I do not agree with that statement. It was not absolutely different, but so far as I have read was quite similar, and at any rate the sixth clause was.

113. Cross-question. Yes; but the application was very different, was it not?

Answer. Not as to the general release, for that is covered by the sixth clause.

Mr. FAY: The application of the contract, I said.

Answer. And I have not given any statement as to how I would interpret the other parts of the contract.

114. Cross-question. Do you consider a contract for the building of a ship entire—contract for furnishing of materials and of labor—not very materially different from a contract in which the contractor agrees to build a ship and the Government agrees to furnish materials?

Answer. In that particular matter there is a very great difference. In such incidental matters as insurance, partial payments, changes, and general release, there is complete similarity.

115. Cross-question. General release for what?

Answer. For all claims of any kind *of* description.

116. Cross-question. Arising under the contract?

Answer. Yes.

117. Cross-question. Not arising outside the contract?

Answer. No; if anybody has a claim that arises outside a contract, he does not release by a release which covers that particular contract.

118. Cross-question. If these claims rise outside the contract they were not intended by you to be covered by the general release, were they?

Answer. No; I speak merely of claims arising under contract when I refer to the sixth clause.

119. Cross-question. The language of this in one place is: "Under or by virtue of this contract." Now, that language you did not mean to embrace any claim that did not arise under the contract, did you?

Answer. Surely not.

120. Cross-question. Then a claim for the maintenance of the vessel while work was suspended on it would not arise under the contract, would it?

177 Answer. It would in any contract I ever drew.

121. Cross-question. The care and preservation of the property?

Answer. Yes, sir.

122. Cross-question. That arises under the contract?

Answer. It does, if the contract is drawn as the Navy Department has generally drawn them.

123. Cross-question. That is part of the construction of a vessel?

Answer. No.

124. Cross-question. Then this release provides: "By reason of or on account of the construction of said vessel under the contract aforesaid." Then a claim for the maintenance of a vessel during the period of delay would not arise under a contract for the construction of the vessel?

Answer. Yes; I should think so.

125. Cross-question. Did not you say just the opposite a minute ago?

Answer. No.

126. Cross-question. What did you say?

Answer. You asked me whether the maintenance of a vessel would be constructing a vessel, and I said no.

127. Cross-question. Why do you say now that the maintenance of a vessel during the time work is suspended on it is part of construction under the contract?

Answer. I did not so state.

128. Cross-question. What do you mean—but let me put this question to you: If work on a vessel is suspended during the contract period of construction and the contractor expends money for the care and maintenance and preservation of the vessel during the sus-

pended time, do you consider that part of the construction of the vessel?

Answer. I do not. But if the contract provides for it, I consider it as coming under the contract.

129. Cross-question. But if the contract requires them to do it; if the contract does require them to do it, does it come under the contract?

Answer. Much would depend on the drawing of the contract.

130. Cross-question. I am not asking you to construe the contract. I am trying to get at what was in your mind as to the meaning of this.

Mr. COLLINS: Government's counsel desires to state that that is just what claimant's counsel is asking this witness to do, and I have no objection to the question.

Mr. FAY: Is it customary for counsel to state when he has no objection to a question?

Mr. COLLINS: I wish to state it here.

Answer. There are many things that come under a contract that are not construction. The contractor is required ordinarily to keep the vessel insured and to look out for her and maintain her until her delivery. These matters are, therefore, under the contract, but strictly speaking are not matters of construction.

131. Cross-question. You don't mean by your testimony, Mr. Stayton, to contradict the statement of Mr. Tracey as to what he understood by that clause in the contract, do you?

178 Answer. I have no knowledge as to what his statement was, sir, and have testified from my own belief and not from what I knew anybody else had said or testified.

132. Cross-question. Was not his question and answer read to you?

Answer. His question was, but his answer was not.

133. Cross-question. You don't know what his answer was, do you?

Answer. I do not.

134. Cross-question. I will read it to you. Do you remember the question, or shall I reread that?

Answer. I think I remember it in a general way.

135. Cross-question. His answer was: "I did not understand that the party of the first part was to be called upon as a condition of receiving the contract price to be paid for the consideration of the ship to release any claims that he might have against the Government for a breach of the contract on the part of the Government." Now I will ask you if it was in your mind that as a condition precedent for the contractor to receive the contract price to be paid for the consideration of the ship, to release any claims that he might have against the Government for a breach of the contract on the part of the Government?

Answer. In the contracts which I drew I understood that before the final payment was made all matters of every description which arose under that contract had to be settled, and if they were not settled then the contractor would not receive his withheld payments

because there was a dispute, nor would he execute the final release for the same reason. Whenever the two parties were in accord and not until then was the final release to be executed which terminated everything on both sides. That is my understanding.

136. Cross-question. You think, then, that the stipulation for the final release was not binding?

Answer. I think it was very binding. I understood that claimant did not think it was.

137. Cross-question. You say that they must be in accord. He could refuse to execute the final release. When you say he could refuse to execute the final release, I ask you if you mean by that that the stipulation for the final release was not binding on him to execute it?

Answer. When he received all the money that he claimed, he was to execute the final release, not before.

138. Cross-question. That is not what its language says.

Answer. I think it does.

139. Cross-question. You don't think the execution of the release is a condition precedent to receiving the money?

Answer. No. They are substantially simultaneous acts. The provision is, as I remember it, that the money is to be paid on the execution of the release.

140. Cross-question. Then he could not refuse to execute the release?

Answer. Yes, I think he could. I do not see why he could not. If he did refuse he would not get the money that the Government had retained to bring about that particular state of affairs.

141. Cross-question. Then the execution of the release was a condition precedent?

Answer. Simultaneous.

179 142. Cross-question. You went into great detail about Col. Remey's method of preparing a contract; arranging two tables and then slips of paper—all that. Is that the usual form of red tape over in that office?

Answer. It was far from being red tape. It was a very honest discharge of a duty by a gentleman now dead who sought to protect the Government and who has, I believe, succeeded in protecting it from many claims which contractors have brought against it.

143. Cross-question. Did you ever see that kind of maneuver gone into before?

Answer. I did not understand that question.

144. Cross-question. Did you ever see that kind of maneuver gone into before?

Answer. I think I never knew any lawyer so careful in the drawing of contracts as Col. Remey. I have made it a point to try to imitate him, but regret to say that I am not so thorough as he.

145. Cross-question. Was that performance before or after he *he* went insane?

Answer. So far as I know, Col. Remey was not insane. I never saw him after I thought he was, but read reports that he had broken down from his devotion to the work of his country, but hardly

supposed that that would lay him liable to the sort of insinuations I am now hearing.

146. Cross-question. But he was insane, wasn't he?

Mr. COLLINS: The witness has already stated that he did not know that to be a fact, but that he heard that he subsequently broke down, due to overdevotion to the service. I think that is going too far.

Redirect examination by Mr. COLLINS:

1. Redirect question. During all the time that you had business relations and social relations with Col. Remey, and particularly during the period from 1887 to 1890, in June, when you left the office and the Government service, did you observe anything on the part of Col. Remey which indicated to your mind that he was not in the full possession of his mental powers and faculties?

Answer. Never had the slightest intimation.

2. Redirect question. You are a practicing lawyer at the present time?

Answer. I am.

3. Redirect question. A member of a firm?

Answer. Practicing alone.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says, "No."

(See correction to cross-question 72 below.)

WILLIAM H. STAYTON.

Thereupon the proceeding herein was, by consent of the parties, adjourned to Wednesday, the 6th day of September, at 11 o'clock, at the same place.

180 My answer to cross-question 72, on page 22 hereof, is not completely recorded. To my best recollection my answer was: "No. I am not aware of such a holding. We did 'entertain' and recommend to Congress." With this exception my testimony is correctly recorded.

WILLIAM H. STAYTON.

Deposition of Pickens Neagle, for Defendants, Taken at Washington, D. C., on the 7th Day of September, A. D. 1910.

Defendant's counsel, F. W. Collins, Esq.; claimant's counsel, John C. Fay, Esq.

The proceeding herein resumed according to adjournment.

At the same place, on the 7th day of September, 1910, in the presence of the same counsel of both parties, PICKENS NEAGLE, a witness on behalf of the United States, was produced, and, having been by me in like manner sworn, deposed and said that his name is Pickens

Neagle; that his occupation is that of law clerk in the Solicitor's Office, Navy Department; that he is 48 years of age; that his place of residence is 1332 Belmont Street, Washington, D. C.; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in said cause; and that he is not related to the claimant.

And thereupon the said Pickens Neagle was examined by the counsel for the United States, and, in answer to interrogatories, testified as follows:

1. Question. Mr. Neagle, how long have you been connected with the Navy Department and in what capacities?

Answer. I was appointed there in October 7, 1887, after having passed the civil-service examination.

2. Question. What has been your education both legal and general?

Answer. I was graduated at Union College, Schenectady, as bachelor of science and civil engineer. Then I came to Washington in the fall of 1884, entered the law department at Columbian University, now George Washington University, and was graduated in June, 1886. During that time—let me see—later in the fall of 1884 I entered the law offices of Crittenden & Mackey, in Washington, and studied law there while I was pursuing the course at the law school. In the summer of 1886 I entered the law office of George A. & William B. King and stayed there until October, 1887, when I was appointed in the Navy Department. I have been since then employed in the Navy Department in the office of the Judge Advocate General until July 1, 1908, when I was transferred to the office of the solicitor, then a newly established office.

3. Question. You mean the Solicitor of the Navy Department?

Answer. Well, they don't designate it just exactly that way. It is the Office of the Solicitor in the Navy Department. During that time I have been engaged on legal work almost exclusively.

4. Question. When was your attention first directed to the consideration of forms of contract for the construction of ships of war?

Answer. Very soon after I entered the Judge Advocate General's office in the Navy Department—probably six or eight months afterwards.

181 5. Question. What if anything, did you have to do with the preparation of forms of contracts for ships of war?

Answer. Shortly after I entered the Navy Department the principal law clerk in the department left the office, and it then became apparent that I should be called on to take up his work as soon as I should be, in the judgment of the head of the office, qualified to do it. I then began to study from textbooks the subject of contracts generally and to observe and familiarize myself with the forms of contract used in the office for the building of ships and for other purposes as well. My first familiarity with the contract forms in the department came about from my being required to read the proofs of contracts as they were prepared. The contracts are all printed and when they are drafted are sent to the printer to be put in type, and again examined by the one who prepared them before the final form is struck off. During that time there is a great deal of proof reading

to be done, and examining of clauses and provisions and consideration of them, and in that way my familiarity with the contract forms began.

6. Question. Are you familiar with the sixth clause of the nineteenth paragraph of the contract in suit and the contracts going with it in this case?

Answer. The Massachusetts?

7. Question. I mean the Massachusetts?

Answer. Yes; I am familiar with that contract as a whole and with that clause also.

8. Question. When did this clause first come to your attention?

Answer. As it is embodied in the contract for the Massachusetts, it came to my attention when the contract for that vessel was drawn. I drew the contract.

9. Question. What, if anything, did Mr. William H. Stayton, the witness who was on the stand on yesterday, have to do with the preliminary work upon that contract?

Answer. He prepared what is designated as the general statement of provisions to be embodied in the contract. That was gotten out several months before the contract was made and was intended and used for the information of prospective bidders, and from that general statement the contract form was drawn.

10. Question. By you?

Answer. By me.

11. Question. From what source or sources was this particular clause derived?

Answer. It was derived in the main from forms of contract previously used by the department.

12. Question. How long had it been in use and, as nearly as you can remember—I mean substantially as it appears here—employed in connection with the contracts of other ships?

Answer. Seven or eight years; probably seven years.

13. Question. And in how many ships, if you can remember?

Answer. The earliest source of it that I know anything of was the contract form that was used for the earliest cruisers of the new Navy—the Chicago, Boston, and Atlanta, and dispatch boat Dolphin.

14. Question. What consideration and attention was given to the clause in question by you or by the Chief Judge Advocate of the Navy while you were present?

182 Answer. It was given very careful attention in connection with the preparation of the contract as one of the essential features of the contract. The whole contract was drawn with care, and this clause was looked after particularly to see that it was embodied in the contract and in proper language.

15. Question. Who, besides yourself and Mr. Stayton, whom I understand you to state did the preliminary work, and the Judge Advocate General, had to do with the preparation of that clause?

Answer. No one.

16. Question. State, if you know, whether or not in the preparation of the clause in question you or the Judge Advocate General

consulted with the Secretary of the Navy with relation to the phraseology of that clause.

Answer. I did not consult with the Secretary about it, and I feel quite sure that the Judge Advocate General did not.

Mr. FAY: Statement objected to as what he guessed.

17. Question. You say you feel quite sure that the Judge Advocate General did not consult with the Navy Department as to the phraseology of that clause. On what do you base such statement?

Answer. On the ground that the clause in its essential requirements had been used for several years and found to work satisfactorily, and there was great objection in the preparation of those contracts to changing any provision that had been tried and found satisfactory unless there was some cogent reason for changing it; and the Secretary of the Navy at that time paid very little attention to the form of the contract, and it was not submitted to him until it was in the final proof form ready to be printed, and then it was shown to him so that he might give the formal and, I might say, perfunctory instructions to proceed with printing it.

18. Question. What, if anything, did then Naval Constructor Lewis Nixon have to do with the preparation of the clause in question?

Answer. The sixth clause?

19. Question. The sixth clause of the nineteenth paragraph?

Answer. Nothing whatever.

20. Question. Are you certain of that?

Answer. Yes. His advice was not asked on that subject at any time, and I might say, also, that his advice was not asked as to the legal meaning or bearing of any provision in the contract at that time or any time.

21. Question. Who was Secretary of the Navy at the time this contract was signed?

Answer. Benjamin F. Tracy.

22. Question. I desire to ask you a question which was propounded to Mr. Tracy when he was upon the stand, modified of course by the elimination of the words "execution of the contract by you," but otherwise the same, and ask you to answer it. After quoting the clause in question I would inquire whether at the time of the execution of the contract by you on behalf of the United States what claims you understood to be covered by that final release?

Answer. All claims that might arise out of the contract for the construction of the vessel.

23. Question. Please me more explicit, if you can.

Answer. I can not conceive of a claim on account of the construction of the vessel that did not or would not arise—would not
183 have had its origin in the contract—a claim of any kind. As claims have been the bane of the Government's existence, it was intended by that provision to include claims of any and all kinds that might be made against the Government under or arising out of that contract.

24. Question. Gen. Tracy was asked this question, and I would amend it only by omitting the words "as Secretary of the Navy"

and say in lieu thereof "as law clerk of the Judge Advocate General," and then put the question: If it had become your duty as law clerk of the Judge Advocate General of the Navy Department to have framed the release under the terms of that sixth article, you would have framed it so as to include the class of claims——

(Question withdrawn.)

24½. Question. I will ask you to state as law clerk of the Judge Advocate General if you had been called upon to frame the release under the terms of the sixth article would you have so framed it as to include the class of claims covered by this suit?

Mr. FAY: Objected to as immaterial and incompetent.

Answer. I should not have drawn the release to include claims of the kind under consideration by any special designation, but I should certainly have drawn the release so as to include any and every claim that might be brought against the Government on any account connected with the construction and delivery of the vessel under the contract, having in mind in drawing such release that the purpose of the release would be to terminate definitely and comprehensively the *the* contractual relations between the contractor and the Government when the contractor should have delivered the vessel and received his money.

25. Question. What construction of the clause in question by the department from time to time has come to your attention?

Answer. In numbers of ways it has been made clear that the department's attitude toward that clause as requiring a release was that there should be nothing left uncovered by the release over which there could be any sort of contention or claim or demand. As an instance of that I might cite—though possibly not bearing directly on this case—that in several instances the department had received from contractors for ships (I don't mean up to that time, but up to this time) final releases or at least releases that were supposed to be final when the contracts were supposed to be closed and all payments made; and it was afterwards found that a balance was due the contractors on one account or another. For instance, on account of extra work for which the account had not been stated at the time of taking the final release. In all such cases the department has required the contractors to give an additional or new final release so that a payment made could not be construed as reopening or renewing in any way the contractual relations between the Government and the contractor.

26. Question. Do you recall any instance where a construction of this clause and contract was placed upon the same during the administration of Mr. Tracey and while Mr. Philip Hichborn was chief constructor?

Answer. A case of the kind that I have just referred to occurred in 1894, I think it was. The case of the gunboat Machias, built by the Bath Iron Works of Bath, Me.

184 Mr. FAY: That was not in Mr. Tracey's time.

(Answer continued.) I do not remember any case that occurred while Mr. Tracey was Secretary. Hichborn was the last name you mentioned and my attention went to him.

In that case the department had made supposedly final payments to the contractor and taken the final release, and the Bureau of Construction and Repair reported that a balance, on account of a change, I think, of something like seven or eight hundred dollars was due the contractors, and sent up the vouchers for payment.

Mr. FAY: I object to any statement of the witness as to the action of the department as not proper evidence, it being a matter of public record and not subject to parole testimony.

27. Question. Can you furnish the correspondence with reference to this matter, or a certified copy of the same, and attach it to your deposition?

Answer. Yes.

28. Question. Please do so.

Mr. FAY: I object to that unless I have an opportunity to cross-examine.

Mr. COLLINS: You can.

Answer. I can produce it now.

29. Question. Please do it and let counsel for the claimant company have the privilege of examining the same.

Answer. Produced.

30. Question. What other or different view of the ideas and intendments of the Judge Advocate General's office or the Navy Department, as far as you were familiar with the same, than that which you have heretofore expressed did you ever observe or know of during the time that you have been connected with the Navy Department?

Answer. None other.

31. Question. Mr. Neagle, you have stated that you drew the contract in this case. Who drew the release or prepared the release which accompanied the same at the conclusion of the contract?

Answer. I did.

32. Question. Are you familiar with its terms?

Answer. I do not know that I could repeat it verbatim, but I know the substance of it very well.

33. Question. You are familiar with the conditions under which this release was given, are you? I mean now the intendment of the Navy Department so far as your official connection with it was concerned with reference to this release?

Answer. There was a little bit of confusion in the conditions at the time the contract was closed, but there was no confusion as to the intent of the release. I know very well the intent that was in mind when the release was taken.

34. Question. What was that intent?

Answer. To terminate definitely and absolutely the contractual relations betwen the Government and the contractors.

35. Question. What as to claims?

Answer. That there should be no ground on which a claim could be presented growing out of that contract on account of the construction and delivery of the vessel.

185 Cross-examination by Mr. FAY:

1. Cross-question. The Judge Advocate General's office was not a contracting office, was it?

Answer. Yes, sir; it is, if I understand you rightly. It is in that office that the contracts——

2. Cross-question. In that office that the contracts are reduced to writing?

Answer. In that office they are reduced to writing, that is true.

3. Cross-question. They don't make the contracts?

Answer. Yes; they do.

4. Cross-question. Is it anything more than putting into a form the agreements that are entered into between the Secretary and the contractor?

Answer. It is the embodiment of what is entered into between the department and the contractor. It is the thing itself. It is the agreement between the contractor and the department.

5. Cross-question. It is the evidence of agreement, is it not?

Answer. It is evidence of it and yet there is no other agreement than that. That conforms to the law.

6. Cross-question. To make myself clear, Mr. Neagle, if you and Mr. Collins agree to build a house for him, he agrees to pay you in a certain way, and then you come to me to put that contract in writing. Do you consider I am one of the contracting parties?

Answer. You, the attorney, one of the contracting parties; no, sir.

7. Cross-question. There always is a contract before it is reduced to writing?

Anwer. Oh, yes.

8. Cross-question. With that part of it you had something to do?

Answer. Yes; I had something to do with it.

9. Cross-question. You think a law office is a contracting office?

Answer. The instance that you cite is not at all a parallel case.

10. Cross-question. The Judge Advocate General was not charged with the construction of these vessels, was he?

Answer. No; that was the contractor's duty.

11. Cross-question. He was not charged with paying the contractor for doing it, was he?

Answer. Yes; under the Navy regulations he has very well-defined duties with respect to that.

12. Cross-question. With respect to payments?

Answer. Yes, sir.

13. Cross-question. Is he a disbursing officer?

Answer. No; he does not handle the money, but he visées the vouchers. All vouchers for payments come through his hands before they are approved.

14. Cross-question. He sees that they are in proper form?

Answer. He sees that the requirements of the contract are not violated in any way.

15. Cross-question. The voucher is made up by the bureau that has charge of the work?

Answer. No, sir; it is made up by the inspectors where the work is done.

16. Cross-question. That is subordinate to the bureau?

Answer. Yes.

186 17. Cross-question. So your view of it is that the Judge Advocate General's office is a contracting office?

Answer. Yes, sir.

18. Cross-question. Not merely a law office for the purpose of reducing to writing the contracts of the department?

Answer. His duty is not merely reducing to writing the agreement.

19. Cross-question. The contract is between the contractor and the Secretary of the Navy, is it not?

Answer. Yes.

20. Cross-question. And the Secretary of the Navy's intention is the intention of the department?

Answer. Oh, undoubtedly.

21. Cross-question. Of what importance is your intention in the matter?

Answer. Of very great importance, because the intention that is in my mind is derived from instructions received from the department.

22. Cross-question. From the Secretary?

Answer. From the Secretary.

23. Cross-question. Passing through the Judge Advocate General's office?

Answer. Yes; the Judge Advocate General's. Not through the office, but into the office through him.

24. Cross-question. So it is the intention of the Secretary that you want to embody—not your own?

Answer. I might modify that by saying that it is the intention of the President, because, as I recall the law, the President is authorized to have the vessels constructed by contract—if you care to pursue it so far back as that.

25. Cross-question. Well, then, it is not the Secretary's intention. It is the President's intention?

Answer. I do not know what privity there is between the Secretary and the President in every case.

26. Cross-question. I want to know whose intention you wanted to embody in that contract. Was it your own?

Answer. Not my own, because my intentions have no legal status.

27. Cross-question. It was solely the intention of the Secretary that you wanted to embody in there?

Answer. So far as I know.

28. Cross-question. Did the intention of the contractor have anything to do with it?

Answer. Nothing. We prescribed the form and the contractor made his proposal in accordance with that form and signed the contract accordingly.

29. Cross-question. And you did not care whether the contractor's and the Secretary's minds met on the subject of the provisions of the contract or not?

Answer. They must necessarily have met.

30. Cross-question. You did want to embody the contractor's intention, too?

Answer. On proposal made and accepted.

31. Cross-question. Then it was your purpose to embrace in that contract the mutual intention of the contractor and the Secretary?

Answer. Oh, yes; to give the contract validity.

32. Cross-question. Did you have any communication with the contractor on the subject?

187 Answer, Oh, yes.

33. Cross-question. Personally?

Answer. I can not say that I did in the case of the Massachusetts personally. I should say more probably not, because at that time I was not very well acquainted with the contractors. I had never met any of them; I did not know them, and they would go to the Judge Advocate General, he being the head of the office.

34. Cross-question. So far as this special clause was concerned, that was simply copied from the previous form, was it not?

Answer. I should say rather it was derived from the previous form. The original form was different just a trifle from this, but not in any of the essential substance.

35. Cross-question. Little different verbiage?

Answer. Verbiage to fit the latter case as compared with the original prototype.

36. Cross-question. You say you remembered this in contracts as far back as the Dolphin?

Answer. I won't undertake to say which contract was the first of those ships that I mentioned—which bore the earliest date—but the Chicago, Boston, Atlanta, and Dolphin were all right in a lump and they were always referred to as the model to be followed.

37. Cross-question. The Dolphin was contracted for under the secretaryship of William E. Chandler, was it not?

Answer. Mr. Chandler went out in 1895. The Dolphin was during his administration—a couple of years before he went out.

38. Cross-question. Do you know if Mr. Chandler had anything to do with preparing that contract?

Answer. I can not say what relation he had to the contract. I do not know.

39. Cross-question. Did you ever look to see whether that antedated that time?

Answer. What did?

40. Cross-question. Whether that provision for release antedated Chandler's time.

Answer. No; I never looked into that.

41. Cross-question. Never looked?

Answer. You mean to say whether that release was derived from a previous one?

42. Cross-question. Yes.

Answer. No.

43. Cross-question. Did you ever see any of the contracts for the construction of monitors during the war?

Answer. Let me see. There have been a number of claims in the Court of Claims relating to vessels built during the war and I have seen those papers, because when I was first in the office I had a good

deal to do with the Court of Claims business, but I can not say whether or not I have ever seen a contract for one of the monitors.

44. Cross-question. Your idea, Mr. Neagle, is that the Secretary's attention to these contracts was rather perfunctory?

Answer. Yes, sir.

45. Cross-question. That you were the real man in the transaction?

Answer. I was the machine in the transaction; was down in the engine room where the work was done.

46. Cross-question. That's what you were, wasn't it?

188 Answer. Yes, sir.

47. Cross-question. You were not the brains of the concern?

Answer. Yes; I think I was.

48. Cross-question. Machine-made brains?

Answer. Brains running the machine, yes. I do not mean to say by any means that I was the only brains around the place.

49. Cross-question. And you thought you were running the department?

Answer. No, sir; I thought I ran the contract department.

50. Cross-question. And when this release was signed you knew what the intent of Mr. Secretary Herbert in accepting and Mr. Cramp in signing it was, did you?

Answer. I knew what his official attitude was.

51. Cross-question. Do you know what his intent was?

Answer. Yes.

52. Cross-question. Did he tell you?

Answer. No, sir.

53. Cross-question. Have you seen his testimony in this case?

Answer. Yes, sir.

54. Cross-question. Did you see what he swore to on the subject of what his intent was?

Answer. Yes, sir.

55. Cross-question. You don't agree with him as to what his intent was?

Answer. I won't go so far as that.

56. Cross-question. Do you think he falsified when he swore to what his intent was?

Mr. COLLINS: I object to that as an improper question.

Answer. I do not remember from reading Mr. Herbert's testimony that he made a definite statement as to what his intent was.

57. Cross-question. He was asked about it, wasn't he?

Answer. I think so, but I think he rather evaded it.

58. Cross-question. Do you think he knew as much about it as you did?

Answer. I do not think he knew as much about the release at the time the release was signed as I did.

59. Cross-question. You testified that you know that intent that was in mind when the release was given. In whose mind?

Answer. In the mind of the department—the contracting party.

60. Cross-question. What do you mean by the department?

Answer. In the mind of the Secretary of the Navy.

61. Cross-question. You knew what the intent was in the mind of the Secretary of the Navy when that release was signed?

Answer. Yes, sir.

62. Cross-question. How did you find it out; did he tell you?

Answer. No, sir; the Secretary depended on the Judge Advocate General's office.

63. Cross-question. I want to know how you found out what was the intention in his mind.

Mr. COLLINS: That has already been answered.

Answer. Because he depended on the Judge Advocate General's office to frame his intent for him in that case.

64. Cross-question. To frame his intent for him?

Answer. Yes, sir.

189 65. Cross-question. Did he communicate with you what his intent was?

Answer. Never spoke to me about the matter at all.

66. Cross-question. How did you know what his intent was that you were to frame?

Answer. Because the Secretary never goes into things of that kind personally—never went into the question of the final release personally.

67. Cross-question. Did not the contract require his approval of it?

Answer. Yes, sir; and he approved it.

68. Cross-question. Did he approve it himself?

Answer. My recollection is that he affixed his signature on the back of it, say "form approved" or "approved."

69. Cross-question. Now, at the time of the signing of that release was there any claim pending before the department in behalf of the Cramp Company in relation to the Massachusetts?

Answer. Yes; they had——

70. Cross-question. That is enough; you have answered my question.

Answer. Now, you are holding me down. In such a general question as that, it might make my answer appear different from what I intended.

Mr. FAY: That is the answer to the question.

Mr. COLLINS: The witness has a right to make any explanation of his answer which he desires to make.

71. Cross-question. Where were those claims pending?

Answer. I don't know that they were pending. The contractors had represented to the Government by correspondence that they had been delayed on one account and another, and the correspondence showed that they were dissatisfied with the outcome of the contract as a simple payment of the contract price.

72. Cross-question. You were not aware that there was a formal claim pending in the Navy Department before the Secretary that had been referred there by an act of Congress for examination, at the time this release of the Massachusetts was signed?

Answer. I do not remember now whether there was or was not.

73. Cross-question. Well, it appears by this record that there was.

Answer. I do not dispute it.

74. Cross-question. Did you have anything to do with it?

Answer. I do not remember it distinctly and separately from other claims of the Cramp Company.

75. Cross-question. Did you remember that the Secretary of the Navy, within a very few days after this release was signed, reported that claim to Congress favorably?

Answer. I did not know the exact date of his making a report, but I remember that he made a report upon—it seems to me it was a bill relating to Cramps' claim. I do not remember the date of it.

76. Cross-question. I am not referring to a bill relating to Cramps' claim. I am referring to an act of Congress that directed him to examine claims of contractors, and among others that of the Massachusetts, and to report the same to Congress.

Answer. I do not remember when the answer to that was made.

190 77. Cross-question. Do you remember when this final release was signed?

Answer. I do not recall the date of it.

78. Cross-question. Do you remember this identical claim being before the Secretary?

Answer. I do not know the details of this claim; don't know the claim in detail.

79. Cross-question. Then you don't know whether this is for work under the contract or not under the contract?

Answer. I know that it grows out of a contract for the construction and delivery of the vessel.

80. Cross-question. If you don't know what it is, how do you know that?

Answer. Because I have read correspondence about it from which I received the information.

81. Cross-question. Do you remember anything about a special release being obtained in this case aside from that final release?

Mr. COLLINS: Objected to as not proper cross-examination. The witness has not been asked with reference to those special or intermediate releases, but simply concerning the final release.

Answer. We made payments, as I remember, to the contractors somewhere near the time of the completion of the ship and took special releases from them on account of that.

82. Cross-question. Did you have anything to do with the preparation of the special releases?

Answer. Yes; I drew the form.

83. Cross-question. Now, look at that release, dated October 5, 1894, and see if that is the form of special release that you prepared?

Mr. COLLINS: Same objection as before. Let this objection apply to all examination concerning special releases.

Answer (examining papers). Yes; I remember very well I drew

that myself; that is special release of October 5, 1894, referring to the Massachusetts.

84. Cross-question. You say you do recollect preparing this special release of October 5?

Answer. Yes, sir.

85. Cross-question. And did you prepare the final release for the Massachusetts?

Answer. Yes.

86. Cross-question. Did you intend when you prepared these two releases that they should release the identical kind of claims?

Answer. Now, please explain to me what you mean by kind of claims.

87. Cross-question. Well, there may be claims of different kinds, may there not, for the building of a vessel?

Answer. Yes.

88. Cross-question. Extra work, and damages?

Answer. The one that I drew was intended to release all claims.

89. Cross-question. Well, you drew them both.

Answer. I had in mind when I said that the 10th of May there. This intermediate release and the final release were both intended to cover claims of the same kind so far as the intermediate release went. It is a restricted release, while the final release was a general release.

191 Cross-question. The special release was intended to restrict only claims occasioned by delay, was it not?

Answer. Yes, according to its terms.

91. Cross-question. Claims for loss or damage?

Answer. Yes.

92. Cross-question. You testified, as I understand you, that the final release was also intended to include claims for loss or damage.

Answer. Yes, the final release was intended to release all claims of every kind.

93. Cross-question. Claims for loss and damage?

Answer. Claims of every kind arising out of the contract.

94. Cross-question. Well, can you answer that categorically, whether you intended that they should cover claims for loss and damage?

Answer. Yes.

95. Cross-question. Did the Secretary of the Navy have any authority or jurisdiction to entertain claims for loss and damage?

Answer. Yes; I think that is well settled.

96. Cross-question. That he has a right to?

Answer. Yes.

97. Cross-question. Then you think these claims that were submitted to the Secretary of the Navy he had a right to entertain and act upon?

Answer. Not to act upon, because he had no money to pay them. He could not have paid them if he had decided, because he had no money; he depended on the appropriation to make payments.

98. Cross-question. Could he not allow them?

Answer. Oh, yes; I think so.

Mr. COLLINS: Objected to as incompetent.

At this point the taking of this deposition was, by consent of the parties, adjourned subject to notice.

It is stipulated and agreed that either party may recall this witness for further examination or cross-examination.

Deposition of PICKENS NEAGLE resumed according to adjournment, the same parties present as aforesaid, at 3 o'clock *a.* m., September 13, 1910, at the same place.

Cross-examination by Mr. FAY (continued):

99. Cross-question. When you went into the Judge Advocate General's office, you were appointed as a law clerk, were you?

Answer. After taking the law examination and after a call on the civil service for a clerk versed in law.

100. Cross-question. Now, will you answer the question: Were you appointed as law clerk?

Answer. Yes.

101. Cross-question. That would be very short.

Answer. You seemed to throw some doubt on the question as to whether I was a law clerk or not. I had already said that I was a law clerk.

102. Cross-question. And as law clerk you say it was your duty to prepare contracts?

Answer. Yes, sir.

103. Cross-question. Was not your duty to simply put into form the contracts that you were instructed to prepare by the Judge Advocate General?

192 Answer. Yes, sir.

104. Cross-question. In other words, you did not really compose them, but you simply put into form what the Judge Advocate told you to do?

Answer. No; I derived the information that I put into the contracts from the advertisement, the form of proposal, and the bid of the contractor. I had the whole thing to work on just as the Secretary would have if he had been doing it himself, so far as that is concerned.

105. Cross-question. Now, the form of proposal and the advertisement and the contract are still preserved over in that office?

Answer. Oh, yes.

106. Cross-question. Have you got the advertisement in the Massachusetts case?

Answer. I have not seen it in a good long time, but I feel sure it is there, and I think that I could get it.

107. Cross-question. Is not that one of the papers——

Answer. I have it; that's right.

108. Cross-question. —that is required by law to be sent to the returns office?

Answer. Yes, sir.

109. Cross-question. That includes everything that Mr. Stayton testified he prepared, does it not?

Answer. Yes; I had all the things that he worked on, and besides that, I had the proposal of the contractor that he did not have.

110. Cross-question. That is, when you came to draw up the contract?

Answer. Yes.

111. Cross-question. You have in the files of your office the advertisement, which includes whatever Mr. Stayton prepared?

Answer. He prepared the advertisement.

112. Cross-question. It includes what he prepared?

Answer. It does not include all he prepared.

113. Cross-question. I am talking about this particular contract.

Answer. No; the advertisement does not include all that he prepared. There is the advertisement, the form of proposal, and the general statement of provisions to be embodied in the contract.

114. Cross-question. That is all he prepared?

Answer. Yes.

115. Cross-question. Have you got that?

Answer. Yes.

116. Cross-question. Then, what have you got that you prepared?

Answer. The form of original contract that was signed by the contractor.

117. Cross-question. That is what he prepared—the form of contract.

Answer. The general statement of provisions to be incorporated in the contract is a statement that is gotten up in a less formal shape than the contract. It contains the essential features and elements that are to go into the contract, but they are not in contract language.

118. Cross-question. They are in the substance of the contract?

Answer. Yes.

119. Cross-question. Now, before this contract was signed by the contractor the steps that led up to the form of contract were
193 the advertisement, which included the statement of the contract provisions?

Answer. If you will substitute "accompanied" for "included," it will be all right.

120. Cross-question. I do not care what you call it—the bid of the contractor?

Answer. Yes.

121. Cross-question. And what else?

Answer. The statement of provisions to be embodied in the contract.

122. Cross-question. That was already referred to in the advertisement?

Answer. Yes.

123. Cross-question. And out of that you say you drafted the contract?

Answer. Yes.

124. Cross-question. Without any consultation with anybody.

Answer. No, I did not say that; no.

125. Cross-question. Take that as a question, then.

Answer. I consulted with the Judge Advocate General.

126. Cross-question. Then when you said in your testimony in chief in answer to question 15 that besides yourself and Mr. Stayton and the Judge Advocate General no one had to do with the prepara-

tion of this clause of the contract, you meant to include the Secretary, the Chief of Bureau of Construction, Chief of the Bureau of Ordnance, Chief of the Bureau of Equipment, and everybody else in the department?

Answer. Yes, sir. That is clause 6 of the fifteenth paragraph.

127. Cross-question. You did have some consultation with the Judge Advocate General?

Answer. Oh, yes.

128. Cross-question. Did he direct you to prepare it as it was prepared or was that your own idea?

Answer. All the papers were turned over to me to prepare the contract.

129. Cross-question. Just answer the question. Did he direct you about that clause?

Answer. He did not give me any specific directions about that clause, but that clause was included in the whole contract.

130. Cross-question. Then you had no talk with him about that particular clause?

Answer. I can not remember whether that clause was discussed particularly or not.

131. Cross-question. You have no recollection of discussing it with him?

Answer. You hold me down so that I find it hard to answer and make my meaning clear without giving it a double meaning.

132. Cross-question. Can't you answer the question? Have you any recollection of discussing that clause with him?

Answer. Might I look at the clause now or do you want me to say independent of that?

133. Cross-question. No; I want you to give me your recollection first.

194 Answer. I can not say positively whether that particular clause came up for special discussion between me and him or not.

134. Cross-question. Do you remember having a discussion in respect to that particular clause with anybody?

Answer. No.

135. Cross-question. You did not originate that clause?

Answer. No.

136. Cross-question. And you put it in there because somebody told you to?

Answer. Yes.

137. Cross-question. You are sure that was not the Secretary of the Navy?

Answer. The Secretary of the Navy never said anything to me about it at all.

138. Cross-question. And the contractor never said anything to you about it?

Answer. No.

139. Cross-question. Now, you said the other day that it was the policy of the office—I do not know whether you used that exact word, but the effect of it—to follow contract provisions in previous

contracts wherever they had worked well and had been satisfactory?

Answer. Yes.

140. Cross-question. Do you know anything about any previous action of the department upon this particular clause of the contract?

Answer. With reference to whether it should be in the contract?

141. Cross-question. As to how it has worked?

Answer. Yes.

142. Cross-question. Prior to 1890?

Answer. 1890—yes.

143. Cross-question. Can you give me a reference to any particular case where that question had been before the department?

Answer. In the case of the Charleston, I think it was, a cruiser built by the Union Iron Works, we had deducted from the contract price certain amounts on account of failure to make the horsepower required. We required the contractors to give the final release and they afterwards went to Congress and got relief from the penalties.

144. Cross-question. My question was if you could give me a reference to a case where they worked well. Do you mean to say they worked well in the case of the Charleston.

Answer. They worked satisfactorily; yes, sir.

145. Cross-question. Can you give me a reference to the files of the department where that is shown?

Answer. No; I can not. I could look it up and find it for you if that is what you want.

146. Cross-question. Is that just a recollection?

Answer. A recollection; yes.

147. Cross-question. That it had worked well in the case of the building of the Charleston?

Answer. It had worked satisfactorily as a release clause.

148. Cross-question. Any other case that you have in mind?

Answer. Under that clause we had required releases in a number of cases, and no claims had been made upon which the department was held to pay anything. I do not remember any other specific case just now.

195 149. Cross-question. What do you mean by the department was held to pay anything? Do you mean that the department did not pay anything, or——

Answer. That when we obtained the release from the contractor claims under the contract were suppressed or did not——

150. Cross-question. Disregarded.

Answer. Well, that is your word—claims under the contract were suppressed or abandoned.

151. Cross-question. What do you mean by abandoned?

Answer. That that ended the thing so far as the claim under the contract was concerned.

152. Cross-question. Before the Navy Department?

Answer. Well, I do not know that I can restrict it quite so much as that. In some cases the contractors went to Congress, but I do not know of their having claims in any other way.

153. Cross-question. They did not abandon them; they abandoned getting pay out of the Navy Department?

Answer. No; I mean that they abandoned them as claims against the Navy Department under the contract.

154. Cross-question. But not as claims against the United States?

Answer. I understand that it has always been held with reference to that release that no claim could be maintained under the contract.

155. Cross-question. Did not you say a minute ago that these people in the Chicago case went to Congress and got relief?

Answer. I do not remember saying that.

156. Cross-question. What did you say about going to Congress in the Chicago case?

Answer. In the case of the Charleston.

157. Cross-question. I should have said Charleston. They did go to Congress and get relief, did they not?

Answer. Yes; they went to Congress and got them to remit penalties that had been exacted by the department.

158. Cross-question. Do you know anything about that particular case?

Answer. I had very little to do with it and my recollection of it is very faint.

159. Cross-question. Do you know whether the Navy Department antagonized the relief they asked?

Answer. I do not know. Now, let me see, I think the department called the attention of Congress to the fact that there was a release.

160. Cross-question. Well, did they antagonize the relief or did they acquiesce in it?

Answer. I don't know; I do not remember.

161. Cross-question. Now, with respect to this particular form of release that is in this suit. Do you remember any other cases at or about that time where the identical form of release was required by the contract?

Answer. Any other contractor?

162. Cross-question. In any other contract?

Answer. The Union Iron Works, I think, gave a release——

163. Cross-question. I did not ask you how many; I asked you to read the question.

Answer. Yes.

164. Cross-question. How many, according to your recollection?

196 Answer. Probably four.

165. Cross-question. And did those relate to the Oregon, the Indiana, the machinery for the Texas and the Maine and the machinery for the Terror?

Answer. No; I had in mind other releases; I did not think of those.

166. Cross-question. How about those five? Do you remember whether it was the identical form of release in those five cases at or about that same time?

Answer. In the case of the Indiana; yes.

167. Cross-question. How about the Oregon?

Answer. According to my recollection, just the same.

168. Cross-question. How about the machinery for the Texas?

Answer. That was built by the Richmond Locomotive Works, was it not?

169. Cross-question. Yes.

Answer. I should not like to say offhand what the form of release was in that case, because there was some complication in settling up with them under the contract.

170. Cross-question. How about the Maine?

Answer. The Maine?

171. Cross-question. The Maine and Texas were built in Government yards, were they not?

Answer. The Maine was built in the New York Yard, and the Quintard Iron Works built the machinery. My recollection is that they gave a release of the same kind that was given in the Massachusetts.

172. Cross-question. Now, the Texas was built at Norfolk?

Answer. Yes.

173. Cross-question. And the Richmond Locomotive Works built the machinery?

Answer. Yes.

174. Cross-question. The Terror was built at the New York Yard, wasn't it?

Answer. I think it was.

175. Cross-question. While the Pneumatic Gun Carriage Co. put on the pneumatic system, didn't it?

Answer. Yes.

176. Cross-question. Now, all these contracts were practically at the same time, were they not, with the Richmond Locomotive Works, the Quintard Iron Works, the Pneumatic Gun Carriage Co., the Union Iron Works, and the Cramps Co.? They were contracts that went at just about the same time?

Answer. The work was going on under them simultaneously, I think.

177. Cross-question. Did not they all have this same kind of provision for final release?

Answer. Yes.

178. Cross-question. You submitted here at the time you gave your testimony a paper with reference to a controversy about an extra claim for the Machias gunboat. Did that have the same kind of provision?

Answer. Yes, it had the same clause for release.

179. Cross-question. Did you make search of your records and find whether there was any other action of the department on a similar question that you found in the Machias case?

197 Answer. I do not remember. I looked up the case of the Machias to see the correspondence to refresh my memory in that case, and I did not look for any other case.

180. Cross-question. Did you look specifically for the Machias case, or for the principal?

Answer. I looked for the Machias case because I remembered that and wanted to refresh my memory.

181. Cross-question. You had no knowledge of any other case that had any bearing on the subject?

Answer. I had a knowledge of a case relating to a contract for public works, but not a ship contract.

182. Cross-question. When you started in to look up the Machias case you were endeavoring to find out what the action of the department was on this paragraph of the contract, were you not?

Answer. No; I remembered what the department's action was, and I wanted to refresh my memory. In making the search I pointed the way to the records by my recollection.

182½. Cross-question. And did not undertake to see whether that action was uniform or not?

Answer. No.

183. Cross-question. Did not care whether it was uniform or not?

Answer. Yes; there are four cases of ships in which the department, after taking a final release and finding that further payments were due under the contracts, made the payments and took a new final release. Shall I name those for you?

Mr. FAY: Not for me.

(Witness continuing:) I had forgotten those, but repeating the question reminded me of them. It was very clear in my memory that the department had been doing that, and before testifying to the fact I looked up the records to make sure that I was right, and I found that I was right.

184. Cross-question. You found you were right in one case?

Answer. No; I found I was right in five cases.

185. Cross-question. If you had five cases, why did you conceal the other four?

Answer. I did not conceal the other four.

186. Cross-question. You did not mention them.

Answer. That is a very different thing from concealing them.

187. Cross-question. Is it?

Answer. Decidedly. If you will read the testimony there, I think you will find that the questioning ran in such a way that mentioning them was obviated.

188. Cross-question. You never have made a search of the records to ascertain how many cases had been acted upon?

Answer. No.

189. Cross-question. Which you considered to be a departmental construction of this clause?

Answer. Yes; because I knew it had been done often.

190. Cross-question. Do you know what the subject of inquiry is in this case? Do you know what the claim is about?

Answer. Yes; I think so.

191. Cross-question. And do you remember the provisions of the contract?

Answer. Yes.

198 192. Cross-question. I understood you to say the other day that according to your construction or interpretation of the powers of the Secretary, he was authorized to adjust and settle the claim in suit?

Mr. COLLINS: Objected to as not having been asked or answered.

Answer. I do not remember saying that.

193. Cross-question. I understood you to say that the Navy Department was authorized to entertain claims for unliquidated damages.

Answer. No; I did not say that.

194. Cross-question. Did not?

Answer. You did not mention unliquidated damages at all, that I remember.

195. Cross-question. Well, I will ask you the question now.

Mr. COLLINS: Objected to as incompetent and inadmissible and calling for a legal conclusion.

196. Cross-question. Are you of the opinion that the Secretary of the Navy was authorized to hear and determine the claim involved in this suit?

Answer. Not after the contract was concluded, but he could have taken care of it before that.

197. Cross-question. He was authorized before the completion of the contract to audit and allow or disallow this particular claim?

Answer. No. He could have taken care of it by an agreement or supplemental contract.

198. Cross-question. Then he could not have allowed it under the contract as it stands?

Answer. No.

199. Cross-question. And you think it was his intention to provide that if any such claim as this arose, the United States under the contract as drawn would not have been liable for it?

Answer. Yes.

200. Cross-question. And that is your independent judgment? The Secretary never expressed such an idea to you, did he?

Answer. No; the Secretary never said anything about it to me at all.

Redirect examination by Mr. COLLINS:

1. Redirect question. I will ask you to state whether the Secretary ever stated anything in your presence contrary to the view that you have here expressed.

Answer. No; he never did.

2. Redirect question. Or any Secretary of the Navy?

Answer. No; no Secretary of the Navy.

3. Redirect question. When you spoke about the matter of a supplemental agreement before the conditions and covenants, etc., were performed by the contractor, do you know whether or not the claimant company was offered the same privilege which was accorded to the Union Iron Works in the case of the Oregon; that is, with respect to the Indiana and the Massachusetts?

Answer. You mean the agreement with the Union Iron Works for the Government to pay expenses?

4. Redirect question. Claims similar to those in suit for expenses of superintendence and upkeep, etc., during the delay period.

Answer. The department acquainted the Cramp Company with

the fact that an agreement of that sort had been made with
199 the Union Iron Works, and asked them whether they wanted to make the same sort of an agreement with reference to the Massachusetts and Indiana. The Cramp Company said that they did not care to make the agreement, or something like that; I don't remember just the way it was put.

5. Redirect question. In other words, they declined to consider the matter favorably?

Answer. They declined to enter into an agreement.

5½. Redirect question. Do you remember when it was that that talk took place?

Answer. I do not remember positively whether it was talk or correspondence, but my recollection is that it was by correspondence. It occurred very soon after the agreement was made with the Union Iron Works, which was some time in 1893. As I remember it, not far from the time of the expiration of the contract period for the Indiana and the Massachusetts.

Mr. FAY: I object to so much of that question as undertakes to give correspondence in writing.

6. Redirect question. Now, Mr. Neagle, you have heretofore spoken of framing the intent of the Secretary of the Navy in the contract in suit. Please explain what you mean by that expression.

Answer. I think I spoke of the intent in framing the release also.

7. Redirect question. Well, both the intent of the Secretary of the Navy in connection with the provisions of the contract calling for the release, and the release itself.

Answer. It is impossible and unnecessary for the Secretary to go into matters of detail of administration in connection with the fulfillment of contracts. The people in the Judge Advocate General's office were familiar with the contract terms and with the department's practice and policy with reference to them, and the precedents, and the interpretation of the contract provisions. That office always considered for the Secretary claims, questions, and disputes arising under contract provisions and prepared for him his answers, decisions, and instructions relating to claims and questions under the contracts. I do not recall any case in which Secretary Herbert took a different view as to the interpretation of a contract provision or requirement from the interpretation held or suggested in papers prepared for his signature by the Judge Advocate General. And he never, so far as I can recall, rejected or modified the conclusion of the Judge Advocate General with reference to the interpretation—that is, in any case involving the interpretation of a contract provision. Mr. Herbert was as rigid and insistent as any Secretary of the Navy I know of in holding contractors to the fulfillment of their obligations and in securing for the Government its rights under contracts. I had for a number of years been engaged upon detail work under contracts, and when the time came to take the final release for the Massachusetts two supplemental agreements had been made with the contractors by Mr. Herbert in which the contractors had expressly released claims against the Government on

account of its failure to fulfill its part of the contract and on account of delays by the Government in furnishing the armor, and at the time Mr. Herbert reported to Congress on the claim, or on the bill, as I remember it—the bill for the relief of the
200 Cramps—or on the act authorizing him to report on Cramps' claims, he expressly called the attention of Congress to the fact that the contractors had already given release of the claims covered by the act. My familiarity with those facts is what made me feel that I had framed the intent of the Secretary and knew what was in his mind when I drafted the final release in the case of the Massachusetts.

8. Redirect question. Mr. Nixon in his testimony makes the claim that he is responsible for the clause appearing in the third paragraph of the contract which provides that the Government shall furnish the armor within the times and in the order to carry on the work properly. Do you know in what ship contract that language first appears?

Answer. That was taken from a previous contract for the armored ship Monterey.

9. Redirect question. Do you know the date of that contract?

Answer. It was made sometime in the spring of 1889, as I remember it.

Mr. FAY: Answer objected to unless the paper is produced.

10. Redirect question. Can you produce a copy of it?

Answer. I can.

11. Redirect question. Will you?

Answer. Yes. I have not it right here, but can get it.

12. Redirect question. Do you know when it was that Mr. Nixon's connection with the Navy Department began?

Answer. He was in the department——

Mr. FAY: Objected to, as the records of the department should show the truth.

13. Redirect question. Have you examined those records?

Answer. No; I have not.

14. Redirect question. Will you please produce for the records a duly authenticated statement of the time when Mr. Nixon began his period of service in the Navy Department and attach it to your deposition?

Answer. I will.

14½. Redirect question. Mention has been made of duress having been practiced upon the claimant company in connection with the intermediate contracts which they signed which contained a clause releasing claims theretofore incurred due to the Government's failure to deliver the armor. What duress, if any, was practiced by the department to your knowledge upon the claimant company or any of the members of its firm?

Answer. None that I know of.

15. Redirect question. What complaints, if any, of duress did you hear at the time or before the time?

Answer. I heard mention of the fact in connection with Cramps's claim that duress had been practiced on them after they signed the release, but I do not remember hearing of it before.

16. Redirect question. In your testimony earlier to-day you attempted to make some explanation of your researches with reference to the construction—instances of where the department had construed the clause calling for the final release, and the final release itself, in accordance with the way that you in your testimony and Mr. Stayton in his testimony have construed such clause. What instances were those other than that of the Machias?

201 Mr. FAY: Objected to unless the record is produced. His statement of what the record shows is objected to.

Answer. My impression and recollection from the earliest time was that the department was very strict in its interpretation of that clause in the contract calling for the final release, and my recollection was that at several times the question as to the sufficiency of a final release had come up and the department had, in cases where payments had been made after taking a release, made payments due under the contract and required the contractors to execute new releases. I would mention the cases of the North Carolina and the Montana. They are the only cases I can recall by name, but there were two others that I can not at this moment name.

17. Redirect question. What other or different view or construction by the department has obtained during your incumbency?

Mr. FAY: Question objected to as, by the department, unless he specifies what he means by it.

Answer. No other.

18. Redirect question. I will ask you whether or not the views and the construction given by you in your testimony are the views and construction of the Navy Department during the time that you have been connected with it?

Mr. FAY: Objected to as not specific—in the Navy Department. What does he mean by that?

Answer. They are.

Recross-examination by Mr. FAY:

1. Recross-question. Mr. Neagle, you stated that the Cramp Company were given the opportunity to make a supplemental contract. Was that done in a letter?

Answer. I think it was. I can not make sure, but I believe it was.

2. Recross-question. Did you ever see such a letter?

Answer. If it were done, I saw it, and I think it was done.

3. Recross-question. Is there such a letter on file in the Judge Advocate General's Office?

Answer. I have not examined his books to see.

4. Recross-question. Will you examine them and produce it?

Answer. I will.

5. Recross-question. Certified by the Navy Department, if you please.

Answer. Yes.

6. Recross-question. Was there an answer to such a letter?

Answer. Yes.

7. Recross-question. Is that on file in the Navy Department?

Answer. It should be.

8. Recross-question. Did you ever see it?

Answer. If my recollection is right, I saw it.

9. Recross-question. You did see it?

Answer. Yes.

10. Recross-question. Does it belong in the files of the Judge Advocate General's Office?

Answer. Yes.

11. Recross-question. And if such a letter was received there would either be the letter itself or a record of it, would there not?

Answer. Yes.

202 12. Recross-question. Will you produce that—a certified copy of it under the seal of the department, and attach it to your deposition?

Answer. I will, if it exists.

13. Recross-question. Or if any record of it exists?

Answer. Yes.

14. Recross-question. Now you were not present at any verbal conversation on that subject, were you?

Answer. At the time?

15. Recross-question. Oh, just answer the question. Were you present at any verbal conversation when such an offer was made?

Answer. I do not remember that I was.

16. Recross-question. If you don't remember that you were, you would not be able to tell who was present, would you?

Answer. I know that Mr. Nixon was present. I remember his coming to the department on that subject.

17. Recross-question. Mr. Nixon?

Answer. Yes. Coming for the Cramp Company.

18. Recross-question. If you were not present at the conversation, how do you remember that he was present?

Answer. Because the papers in the case were produced for the Judge Advocate General at the time of Mr. Nixon's visit and were sent in to the Judge Advocate General while Mr. Nixon was in his room.

19. Recross-question. You do not understand my question. I asked you if you were present at any such conversation.

Answer. I had already answered that, and you asked me another question.

20. Recross-question. Well, you were not?

Answer. No; I was not present.

21. Recross-question. Then any information that you had of such conversation came to you secondhand?

Answer. Yes.

22. Recross-question. Do you remember who told you about it?

Answer. The Judge Advocate General.

23. Recross-question. Did he consult you about it?

Answer. Yes.

24. Recross-question. Did he usually consult you on the business of the office?

Answer. Always; business that was in my care.

25. Recross-question. That was not in your care?

Answer. What was not? That conversation?

26. Recross-question. Did you have anything to do with that?

Answer. Not with the conversation, except that I got the papers to be given to the Judge Advocate General, that he might talk with Mr. Nixon about it.

27. Recross-question. What papers did you get?

Answer. I got the agreement between the department and the Union Iron Works, so that Mr. Nixon might see the terms of it.

28. Recross-question. Who did you give it to?

Answer. The Judge Advocate General.

29. Recross-question. And whether he showed it to Mr. Nixon or not you don't know?

Answer. Except that he told me afterwards.

30. Recross-question. But you don't know?

Answer. Yes; I do know. He told me so.

203 31. Recross-question. You are a lawyer, aren't you?

Answer. Yes, sir.

32. Recross-question. You know that what you get from hearsay is not knowledge, don't you?

Mr. COLLINS: In this case Capt. Lemley is dead, and can not testify.

Mr. FAY: And the witness would not testify as he did if Capt. Lemley were alive.

Mr. COLLINS: That is a reflection on the integrity of the witness, which I resent, and which the attorney should not make.

Mr. FAY: And that the attorney intends.

Mr. NEAGLE: The witness also resents it and states that he has records that will prove his assertion.

Mr. FAY: Please produce the records.

Mr. NEAGLE: I will.

Redirect examination by Mr. COLLINS:

19. Redirect question. You heard Mr. Stayton's testimony?

Answer. Yes.

20. Redirect question. You heard him examined with reference to the Indiana contract as though the Indiana contract were the first contract that contained an armor clause, did you not?

Answer. Yes; I think he stated to that effect.

21. Redirect question. Well, do you remember whether or not the Indiana contract was the first contract which called for the furnishing by the Government of armor?

Answer. No; it was not the first one.

22. Redirect question. Do you remember which ship contract was the first?

Answer. The Indiana contract was antedated by that for the Olympia and the Monterey, for both of which vessels the Government furnished armor.

23. Redirect question. Do you recall the dates of those contracts?

Answer. The Monterey contract was executed early in 1889—I think in April.

Mr. FAY: I object to all of this testimony of the records unless they are produced.

Mr. NEAGLE: I will produce the copy of the Monterey contract, and also memorandum from the files that will corroborate my statement about Mr. Nixon seeing the supplemental agreement relating to the Oregon.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says, "I do not think of anything just now."

PICKENS NEAGLE.

Attached hereto are copies of the contract, dated June 14, 1889, for the Monterey; records in the Bureau of Navigation showing the orders detailing Ass't Naval Constructor Lewis Nixon to duty in the Bureau of Construction and Repair and detaching him from the bureau; department's letter of June 9, 1894, to the Chiefs of the Bureaus of Construction and Repair and Steam Engineering relating to payments in final settlement under the contract for
204 gunboat No. 5, Machias; letter, dated June 12, 1894, from the Chief of the Bureau of Construction and Repair to the superintending constructors of naval vessels relating to the preparation of vouchers for final payments under contracts; file stamp and briefing on the back of letter numbered 931 of 1893 and its inclosure, together with the file clerk's memorandum in pencil filed with said letter numbered 931 of 1893.

The following explanation is submitted of the file clerk's lead-pencil memorandum mentioned above, viz:

"1 Enc.," comprising the first line, means one inclosure of the paper with which the memorandum was filed.

"Agreement," comprising the second line, means that the one inclosure first indicated was one of the triplicates of the memorandum of agreement constituting the inclosures of letter 931.

"To Le" means that one of the inclosures, that is, one of the triplicates of the memorandum of agreement, of letter 931 was taken from the files for Capt. S. C. Lemly, then the Judge Advocate General. "Le" standing for Lemly.

The figures "5/2/94" mean May 2, 1894.

This memorandum is of the kind customarily placed by the file clerk in the files to show when and for whom papers were taken from the files and indicates that the paper therein described was on the date given taken from the files for the Judge Advocate General.

I am familiar with the manner in which the files were kept in the Judge Advocate General's office at that time, and the memorandum above mentioned indicates to me that the paper therein described

was taken from the files in accordance with the request of the Judge Advocate General and delivered to him for Mr. Nixon. In connection with this I refer to questions Nos. 16 to 32, inclusive, of recross-examination in my testimony in this case.

I was well acquainted with the man who was at that time file clerk, Mr. Halleck Donoho, since deceased, and am familiar with his handwriting and know that the memorandum above mentioned is in his own handwriting.

I have made search of the files and records of the department and fail to find correspondence, or record thereof, between the department and the William Cramp & Sons Ship & Engine Building Co. relative to an agreement between the Union Iron Works and the United States providing that the Government should bear certain expenses connected with the battleship Oregon in case of delay on the part of the department in furnishing the armor for that vessel. In connection with this I refer to questions 4 and 5, redirect examination, and to questions Nos. 1 to 13, recross-examination, in my testimony in this case.

The foregoing statements are made by me with the understanding that I am under oath as administered to me in this case.

PICKENS ISENGLE.

205 DEPARTMENT OF THE NAVY,
BUREAU OF NAVIGATION,
WASHINGTON, D. C., September 22, 1910.

Record of Service of Lewis Nixon, Late Assistant Naval Constructor, U. S. N., in the Bureau of Construction and Repair.

1886, Dec. 20: Detached from duty at the Delaware River Iron Works and to the Bureau of Construction; duty to continue until December 31, 1888.

1887, Jan. 10: Detached and to special duty at Philadelphia in connection with the new cruisers; to continue until January 10, 1889.

1888, Dec. 26: Duty to continue until December 31, 1890.

1889, Sep. 17: Detached and to duty at the navy yard, New York; to continue until September 17, 1892.

1890, May 27: Detached and to the Bureau of Construction and Repair; duty to continue until June 1, 1893.

1890, Nov. 4: Resignation accepted to take effect May 1, 1891, and granted leave of absence until that date.

Contract for the Construction of an Armored Coast-defense Vessel for the United States Navy.

Contract, of two parts, made and concluded this fourteenth day of June, A. D. 1889, by and between the Union Iron Works, a corporation created under the laws of the State of California, and doing business at San Francisco, in said State, represented by the vice president of said corporation, party of the first part, and the United

States, represented by the Secretary of the Navy, party of the second part.

Whereas the third section of the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-eight, and for other purposes," approved March 3, 1887, made an appropriation toward the construction of naval structures to be used for coast and harbor defense;

And whereas, after due advertisement, the proposal of the said party of the first part for the construction of one of such structures—including the hull and machinery, the fitting, fixing, placing, and securing of her armor, and articles of equipment specified—to wit, a twin-screw armored vessel of about four thousand tons displacement, which, for the purposes of this contract, is designated and known as the "Armored coast-defense vessel," has been duly accepted by the Secretary of the Navy;

And whereas the plans and specifications required by said act have been duly provided, adopted, and approved:

Now, therefore, this contract witnesseth, that, in consideration of the premises, and for and in consideration of the payments to be made, as hereinafter provided for, the party of the first part, for itself and its successors and assigns, and its legal representatives, does hereby covenant and agree to and with the United States as follows, that is to say:

First. The party of the first part will, at its own risk and expense, construct, in accordance with the provisions of the act of
206 Congress relating thereto and in conformity with the aforesaid plans and specifications, one armored coast-defense vessel of about four thousand tons displacement, with fittings as specified, and equipment as called for by the specifications, of the following dimensions:

	Feet.	Inches.
Length between perpendiculars	250	00
Extreme breadth	59	00
Depth in hold from top of main-deck beams to inner bottom	14	$7\frac{5}{16}$

such vessel to be constructed of steel, of domestic manufacture, and to be provided and fitted with machinery, engines, and boilers, also of domestic manufacture, complete in all their parts, appurtenances, and spare parts, and fittings and equipment, in all respects as described in the annexed drawings, plans, and specifications, and in the aforesaid act of Congress, and will deliver said vessel at the navy yard, Mare Island, California, to such person or persons as the Secretary of the Navy may direct to receive the same; it being, however, expressly understood and agreed that if any article or thing included in or covered by the plans and specifications aforesaid shall be found, during the prosecution of the work under this contract, to be not produced or manufactured in the United States, and if, after reasonable effort, it shall be found impracticable to obtain the same as an article of domestic manufacture, then and in such case provision

shall be made, by or with the approval of the Secretary of the Navy, for such alteration in the plans and specifications, or for the adoption of such new or different device or plan, as may be found necessary in order to carry out and complete this contract, subject, as to increased or diminished compensation by reason of such change, to the conditions applicable to changes as expressed in the second clause of this contract.

Second. The construction of the hull and machinery and the fittings and equipment of said vessel shall conform in all respects to and with the drawings, plans, and specifications above referred to, which drawings, plans, and specifications are hereto annexed, and shall be deemed and taken as forming part of this contract, with the like operation and effect as if the same were incorporated herein. No omission, in the drawings, plans, or specifications, of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the object and intent of the act of Congress above referred to, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the drawings, plans, and specifications aforesaid shall not be changed in any respect, when the cost of such change shall, in the execution of the work, exceed five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; and that, if changes are thus made, the actual cost thereof, and the damage, if any, caused thereby, shall be ascertained, estimated, and determined by a board of naval officers, appointed by the Secretary of the Navy, and that the party of the first part shall be bound by the determination of said board,
207 or a majority thereof, as to the amount of increased or diminished compensation which the said party of the first part shall be entitled to receive, if any, in consequence of such change or changes.

Third. The party of the first part will, within twelve months from the date of this contract, furnish all working drawings and templates necessary to show the dimensions and shape of each and every armor plate and the position and sizes of the bolt holes therein, the spacing and dimensions of said bolt holes to be in accordance with the specifications and subject to the approval of the Secretary of the Navy; it being expressly understood and agreed that the United States furnish the armor, armor bolts, and their accessories, trim the armor plates to the drawing or template sizes and shapes, within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by the said approved drawings and templates, and deliver said armor, armor bolts, and their accessories at such reasonable place or places in the shipyard of the party of the first part as may be designated by the party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the

first part shall, at its own risk and expense, properly fit, fix, place, and secure the armor to the vessel, and furnish all other materials and labor required in the construction of said vessel and her machinery, fittings, and equipment as called for by the aforesaid plans and specifications.

Fourth. The materials and workmanship used and applied in the construction of the hull, machinery, fittings, and equipment of said vessel, and in the fitting, fixing, placing, and securing of her armor, in details and finish, shall be first class and of the very best quality, and shall, from the beginning to the end of the work, be subject to the inspection of the Secretary of the Navy; it being hereby expressly understood, covenanted, and agreed that the said Secretary may appoint suitable inspectors, to whom the party of the first part agrees to furnish such samples and such information as to the quality thereof and the manner of using the same as may be required, and also any assistance they may require in determining the weight and quality of steel and other metals and of wood and other materials, either used or intended for use in the construction of said vessel, her machinery, fittings, or equipment, or in the fitting, fixing, placing and securing of her armor; and that the inspectors may, with the approval of the said Secretary, peremptorily reject any unfit material or forbid the use thereof. The inspectors shall at all times during the progress of the work have full access thereto, and the party of the first part shall furnish them with full facilities for the inspection and superintendence of the same.

Fifth. The steel to be used in the construction of the hull, machinery, and appurtenances of said vessel, except that used in the construction of her armor, shall conform to the "Specifications for inspection of steel for use in the construction of the hull and machinery of an armored coast-defense vessel for the United States Navy," approved by the Secretary of the Navy under date of January 15, 1889, which are annexed to and form a part of this contract.

Sixth. The party of the first part will, at its own expense, prepare such plans or drawings as may be necessary during the
208 progress of the work, and will submit the same to the Navy Department for approval before the material is ordered or the work commenced.

Seventh. The hull, machinery, fittings, and equipment of said vessel, with her armor fitted, placed, and secured as aforesaid, shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract; but the lien of the United States upon said hull, machinery, fittings, and equipment, respectively and collectively, for all moneys advanced on account thereof, shall commence with the first payment, and shall thereupon attach to so much of the work and materials as shall then have been performed and furnished, and shall, in like manner, attach from time to time as the work progresses and as further payments are made, and shall continue until the same shall have been properly discharged. In case the completion of the vessel, machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of her armor, shall be delayed beyond the said period of

three years, penalties shall be imposed upon the party of the first part for each and every day (excepting Sundays) in excess of said period, and until the vessel, machinery, fittings, and equipment, including the fitting, fixing, placing, and securing of her armor, are completed and ready for delivery as follows, viz: During the three months next succeeding the expiration of said period, fifty dollars per day; during the fortieth, forty-first, and forty-second months from the date of this contract, one hundred dollars per day; and for each and every day (excepting Sundays) during which such completion shall be delayed beyond the period of three years and six months from the date of this contract, two hundred dollars per day, all penalties thus incurred to be deducted from time to time from any payment or payments falling due under this contract: Provided, however, That such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand out of workmen employed in the construction of the hull or machinery of said vessel, or by other circumstances beyond the control of the party of the first part; but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified: Provided, further, That in case of any such alleged delay the party of the first part shall give immediate notice thereof to the Secretary of the Navy.

In case any question shall arise under this contract concerning premiums or penalties, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to this contract.

All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of said vessel: Provided, however, That no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the party of the first part shall,
at the time of the occurrence of such delay, notify him in
209 writing of the facts and circumstances in each case and of the extent to which the said party of the first part claims that the final completion of the vessel is thereby delayed.

Eighth. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of the hull, machinery, fittings, or equipment of said vessel, or any part thereof, or in fitting, fixing, placing, and securing the armor, under this contract, and to

protect and discharge the Government from all liability on account thereof by proper releases from patentees or otherwise and to the satisfaction of the Secretary of the Navy.

Ninth. The hull, machinery, fittings, and equipment embraced by this contract, and all materials and appliances provided for and used or to be used in the construction thereof, shall be kept duly insured, which insurance shall be renewed and increased from time to time by and at the expense of the party of the first part, the loss, if any, to be stated in the policies as payable to the United States; the insurance to be effected in such manner and in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed from time to time by him, not exceeding the amount of advance payments made under this contract.

Tenth. The party of the first part hereby further covenants and agrees that the vessel to be constructed under this contract shall be sufficiently strong to carry her armor, and the armament, equipment, coal, stores, and machinery prescribed by the Secretary of the Navy and indicated in the annexed plans and specifications; that the total weight of said machinery, including engines, boilers, and appurtenances; all fixtures in engine and fire rooms: smoke pipes; ventilators; distilling apparatus; heating apparatus; tools and workshop; and water in boilers, condensers, pumps, pipes, and stern tubes; but not including stores, spare parts, or turret machinery, shall not exceed four hundred and thirty-one (431) tons, this weight to be determined from the certified records of the actual weight of the parts of the machinery as they are sent on board the vessel to be connected up, except the weight of the contained water, which shall be calculated from the actual volumes in steaming condition as shown on the certified drawings of the completed machinery, the weight to be calculated for salt water, except for those parts where fresh water only is used; and that when the vessel is completed and ready for delivery, as required by the plans and specifications, she shall be subjected to a trial trip under conditions prescribed or approved by the Secretary of the Navy to test the hull and fittings and the machinery, including engines, boilers, and appurtenances; and that said vessel shall be accepted only on fulfilment of, and subject to, the conditions and agreements hereinafter set forth.

(1) That the working of the machinery in all its parts shall be to the satisfaction of the Secretary of the Navy.

(2) That the collective indicated horse power developed by the propelling, air-pump, and circulating-pump engines, under the conditions prescribed by the Secretary of the Navy, shall be five
210 thousand four hundred (5,400) maintained successfully for four (4) consecutive hours: Provided, however, That if such maximum be exceeded and successfully maintained for such period the party of the first part shall be entitled to receive, as additional compensation over and above the contract price of the vessel, the sum of one hundred dollars ($100) per indicated horse power to the extent of such excess; but if the collective indicated horse power developed and successfully maintained as aforesaid shall fall below the said maximum the sum of one hundred dollars ($100) per indicated horse power shall be charged against the party of the first part as a

penalty in proportion to such decrease as between the said maximum of five thousand four hundred (5,400) and a minimum of four thousand eight hundred (4,800), such penalty to be deducted from any payments due or to become due under this contract: Provided, further, That if the power so developed and maintained as aforesaid shall fall below the said minimum of four thousand eight hundred (4,800) the vessel shall not be accepted: Provided, also, and it is hereby further expressly understood, covenanted, and agreed—the cost of said vessel, exclusive of armament, being limited by the aforesaid act of March 3, 1887, by reason of which limitation it is not in the power of the Secretary of the Navy to incur or create, on the part of the United States in and about the construction of said vessel, pecuniary obligations which, in the aggregate, shall exceed such limit—that whenever the aggregate expenditures incurred and paid in the construction and equipment of said vessel, exclusive of armament, shall have reached the limit aforesaid, then and in such case any and all premiums which may have been earned by the party of the first part under the provisions of this contract, but which, when such limit is reached, shall remain unpaid, shall be subject to the approval and action of Congress, and that in no event shall any obligation be deemed to have been created, nor shall any claim exist, for or on account of such unpaid premiums, until such claims shall have been approved by Congress.

(3) That said vessel, including hull, fittings, equipment, machinery, engines, boilers, and appurtenances, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, shall be found to be strong and well built and well performed, and in strict conformity with the contract, drawings, plans, and specifications, and shall be approved by the Secretary of the Navy; Provided, however, That in case the said trial shall not prove to be successful and satisfactory to the Secretary of the Navy the expenses of such trial shall be borne by the party of the first part, and that in case the results thereof, or of any further trial duly authorized, shall be successful and satisfactory to the Secretary of the Navy, the expenses of such successful trial shall be paid by the party of the second part, it being expressly understood and agreed that the party of the second part shall not be responsible for the expenses of any unsuccessful trial of said vessel or machinery prior to an acceptance of the vessel under the eleventh clause of this contract.

Eleventh. If at and upon the trial trip before mentioned the foregoing conditions shall be fulfilled, said vessel shall be accepted, and the final payments made, including all reservations, subject, however, to a special reserve of twenty-five thousand dollars ($25,000) from and out of the reservations hereinafter provided for. This sum shall be held until the vessel has been finally tried, after
211 being fully equipped, armed, or weighted correspondingly, and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy; Provided, That such final trial shall take place within four months from and after the preliminary acceptance of the vessel as herein provided for.

If at and upon such final trial, or if at any time within four months from the date of the preliminary acceptance of the vessel, as herein provided for, such final trial not having taken place, any weakness or defect in the hull, fittings, or equipment, due to either defective workmanship or defective materials, shall appear, the same shall be repaired to the satisfaction of the Secretary of the Navy, and at the expense of the party of the first part; or if, at any time during four months after the preliminary acceptance of the vessel, the machinery, engines, boilers, or appurtenances, or any part or parts thereof, shall be found to be defective, or if there shall be any failure, breaking down, or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers, or appurtenances, the same shall be corrected and repaired, to the satisfaction of the Secretary of the Navy, at the expense of the party of the first part, which may, if it so desires, have an engineer of its own selection present in the engine room of said vessel, at any time or times during said period, who shall have full opportunity to observe and inspect the working of the machinery in all its parts, but without any directing or controlling power over the same, and, in case such engineer shall be a civilian, his compensation shall be paid by the party of the first part.

If said vessel be not ready for such final trial within the period of four months from and after her acceptance as herein provided for, through no fault or delay on the part of the party of the first part, and no defects in the hull, fittings, or equipment, or in the machinery, including engines, boilers, and appurtenances, due to either defective workmanship or defective materials, shall have appeared, then the vessel shall be finally accepted, and the "special reserve" aforesaid paid, subject, however, to deduction for such penalties, if any, as shall have been incurred under this contract.

Twelfth. It is further mutually understood, covenanted, and agreed that, in case of the failure or omission of the party of the first part, at any stage of the work prior to final completion, from any cause or causes other than those specified in the seventh clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited. The party of the first part shall thereupon, and on notice thereof in writing, be, and does hereby, in consideration of the premises, for itself and its successors and assigns, and its legal representatives, acknowledge itself to be justly indebted to the United States, as for liquidated and ascertained damages, in a sum equal to the aggregate amount of all advance payments theretofore made to said party of the first part for or on account of the work to be done under this contract, and does further covenant and agree as aforesaid to refund the same on demand, or within sixty days thereafter, and that the United States shall and may hold, as collateral security for such refund, the vessel, machinery, materials, fittings, and equipment, or so much thereof as shall then have been constructed or furnished, or as shall be on hand for the purposes of construction. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory

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of all work done or commenced in, upon, or about the hull, machinery, fittings, and equipment of said vessel, and of all materials on hand applicable thereto, the property of the party of the first part, and shall cause the same to be duly valued by a board, consisting of not less than five persons qualified by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials and ascertain and declare the fair market value thereof, including a reasonable and customary margin of profit upon so much of the work as shall have been, at the time such forfeiture is declared, satisfactorily performed; and upon such examination the parties of the first part may attend and submit such evidence as the board may deem proper.

Thirteenth. Upon receipt of the report and finding of said board, and upon his approval thereof, the Secretary of the Navy may, in his discretion, proceed to complete the vessel, machinery, fittings, and equipment, and all other work required under the contract, in accordance with the contract, plans, and specifications, using for that purpose all suitable materials on hand and included in the inventory aforesaid; and the title to said vessel, machinery, fittings, and equipment, or so much thereof as shall have been completed, and to all such materials, shall forthwith vest in the United States; and the party of the first part does hereby, for itself and its successors and assigns and its legal representatives, covenant and agree to and with the United States that, on receiving notice of the intention of the Secretary of the Navy to proceed to the completion of the work, the party of the first part will surrender the same and all materials on hand, together with the use of the yard or "plant," and all machinery, tools, and appliances appertaining thereto and theretofore used or necessarily to be used in and about the completion of the work.

Fourteenth. In case the Secretary of the Navy shall proceed, under the foregoing clause, to complete the work, such procedure shall be without unnecessary delay, and shall be at the risk and expense of the party of the first part, who shall be chargeable with any increase in the cost of materials or labor incurred by reason of the failure of the party of the first part to perform the contract. Upon the final settlement of the liability of the party of the first part, an account shall be stated substantially as follows:

The party of the first part shall be charged—

1. With all advance payments.

2. With the extra cost, if any, of materials and labor, and all other extra expenses, if any, over and above the contract price incurred in the completion of the work.

The party of the first part shall then be credited with the value of the work done up to the time of suspension, and of the materials on hand, as ascertained by the board and approved by the Secretary of the Navy under the provisions of the twelfth clause of this contract, and with such advance payments, if any, as may have been refunded. If a balance shall thereupon appear in favor of the party of the first part, the same shall be paid to and accepted by the party of the first part in full discharge of all claims under this contract; but if a bal-

ance shall appear in favor of the United States, the party of
213 the first part hereby covenants and agrees as aforesaid to pay and discharge the same on demand.

Fifteenth. It is mutually understood, covenanted, and agreed by and between the respective parties, that it shall not, under any circumstances, be obligatory upon the party of the second part to accept or pay for the vessel, or any part thereof, to be constructed under this contract, unless the same shall have been completed in strict conformity with this contract, and in accordance with the provisions of the act of Congress relating thereto, and that this qualification shall be deemed and taken as applicable and applying to each and every clause, covenant, and condition, express or implied, in this contract contained.

Sixteenth. It is mutually understood, covenanted, and agreed, by and between the respective parties, that this contract shall not, nor shall any interest therein, be transferred by the party of the first part to any other person or persons.

Seventeenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition that no Member of or Delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to Members of or Delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Eighteenth. The United States, in consideration of the premises, do hereby covenant, promise, and engage to and with the party of the first part as follows:

1. The contract price to be paid for said vessel, machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work to be performed under this contract, shall be one million six hundred and twenty-eight thousand nine hundred and fifty dollars ($1,628,950.00).

2. Payments shall be made by the United States in ten equal instalments, as the work progresses, with a reservation of ten per cent from each instalment.

3. No payment shall be made except upon bills, in triplicate, certified by the inspectors, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

5. The last payment shall not be made until this contract shall have been fully performed by or on the part of the party of the first part, and the vessel, machinery, fittings, and equipment shall have been accepted by the party of second part, as provided for in the eleventh clause hereof.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, it shall be entitled, within ten days after

the filing and acceptance of its claim, to receive the said special reserve, or so much thereof as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

214 Nineteenth. If any doubts or disputes arise as to the meaning of anything in the drawings, plans, or specifications, or if any discrepancy appear between the drawings, plans, or specifications and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds itself and its successors and assigns and its legal representatives to abide by his decision in the premises.

In witness whereof the respective parties have hereunto set their hands and seals the day and year first above written.

HENRY F. SCOTT, [L. S.]
Vice President Union Iron Works.

[Seal of Navy Dep't.]

B. F. TRACY, [SEAL.]
As Secretary of the Navy.

Signed and sealed in the presence of—

[SEAL.] JAS. O'B. GUNN,
Secretary Union Iron Works.
WM. B. REMEY,
Judge Advocate General,
as to B. F. Tracy, Secretary of the Navy.

NAVY DEPARTMENT,
WASHINGTON, June 9, 1894.

GENTLEMEN: Referring to the voucher in favor of the Bath Iron Works, in the sum of $780, for extra work done on gunbooat No. 5, the Machias, accompanying the letter of the Bureau of Construction and Repair to the department of the 8th instant, I have to inform you that the bill in favor of that firm in the sum of $6,182.40 was forwarded to the department with a letter from the Chief of the Bureau of Construction and Repair stating that the amount of such voucher was to be paid "in final settlement for building gunboat No. 5, Machias, under contract dated April 12, 1890, as directed by the department in its letter of the 5th instant," and that supposing that the amount stated in the last-mentioned voucher was all that was to be paid on account of the Machias the department required the Bath Iron Works to execute the final release provided for in the contract for that vessel.

It is expected that hereafter all bills for extra work and all amounts due the contractors in connection with the construction of a vessel under contract shall be paid before the time for making final settlement under the contract, or at the time of making such settlement, and that when the bureaus forward the vouchers for the final payment under such contract the department can feel assured

that there are no further payments to be made under the contract on any account.

Very respectfully,

H. A. HERBERT,
Secretary of the Navy.

S. C. L.

The Chiefs of the Bureaus of Construction and Repair and Steam Engineering.

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DEPARTMENT OF THE NAVY,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., June 12, 1894.

SIR: 1. The bureau quotes the following extract from a letter from the department of the 9th instant, for your information:

"It is expected that hereafter all bills for extra work and all amounts due the contractors in connection with the construction of a vessel under contract shall be paid before the time for making final settlement under the contract, or at the time of making such settlement, and that when the bureaus forward the vouchers for the final payment under such contract the department can feel assured that there are no further payments to be made under the contract on any account."

2. You will please note carefully the above-quoted instructions and be governed thereby in forwarding certified bills for extra work on vessels building under your supervision.

Very respectfully,

PHILIP HICHBORN,
Chief Constructor U. S. N., Chief of Bureau.

The Superintending Constructor, Bath Iron Works, Bath, Maine.

[1st Indorsement.]

DEPARTMENT OF THE NAVY,
BUREAU OF CONSTRUCTION AND REPAIR, June 12/94.

Subject: —.

1. Respectfully forwarded to the Bureau of Steam Engineering.

2. This bureau has directed all superintending constructors to be governed by the within instructions in forwarding certified bills for extra work.

PHILIP HICHBORN.
Chief Constructor U. S. N., Chief of Bureau.

In the Court of Claims.

Nos. 20857 to 20862.

WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
v.
THE UNITED STATES.

Massachusetts, Brooklyn, Iowa, New York, Columbia.

Stipulation.

Whereas on the application of the defendant to extend the time to take the testimony of Thomas J. Leger in the above-entitled cases, the court, on the 14 day of November, 1910, made the following order: "Allowed: Testimony to be taken, however limited to the question of the financial embarrassment of the claimant company averred in its petition, the same to be taken as speedily as the claimant company will consent thereto, and not later than January 1, 1911, and may be taken on written interrogatories at the option of the defendant. S. J. P., Ch. J. Nov. 14, 1910." It is hereby
216 stipulated and agreed by and between the parties hereto represented by their duly accredited counsel, that the testimony of Thomas J. Leger, a witness called on behalf of the United States, shall be taken upon typewritten interrogatories and cross-interrogatories, prepared by respective counsel, and questions propounded to the witness shall be taken down in the presence of a commissioner of the court or notary public, duly qualified to administer oaths, and answers to the same recorded in like manner. Said commissioner of the court or notary public may be selected by the United States attorney resident in San Francisco. Said testimony to be taken at a day to be agreed upon between the commissioner of the court or notary public so selected and said Thomas J. Leger, neither counsel for the United States nor for the claimant company being present or participating in the hearing. Said testimony may be taken as agreed upon between the commissioner or notary public, as the case may be, and said Thomas J. Leger at any time agreeable to both, between the 23rd day of November and the 10th day of December, 1910, both parties reserving the right of objection as to the competency, relevancy, and materiality of the testimony taken.

F. W. COLLINS,
Attorney for the United States.
JNO. C. FAY,
Attorney for Claimant.

November 18th, 1910.

Deposition of Thomas J. Leger, for Defendants, Taken at San Francisco, Cal., on the 5th Day of December, A. D. 1910, on Written Interrogatories and Cross-interrogatories (no Counsel Being Present).

THOMAS J. LEGER, having been produced as a witness on behalf of the defendants, the United States, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to said cause; and thereupon deposed and said that his name is Thomas J. Leger; that his occupation is that of accountant; that he is 48 years of age, and that his place of residence is San Francisco, Cal.; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in said cause, and that he is not related to the claimant.

And thereupon the said Thomas J. Leger was examined by me, the notary public aforesaid, and, in answer to interrogatories, testified as follows:

1. Question. State your full name, age, address, occupation; relation, if any, to the claimant company or any of the firm; interest, if any, in the result of the suit.

Answer. Thomas J. Leger; age, 48; residence, San Francisco, Cal.; occupation, accountant; no relation to the claimant company or to any of the firm, nor have I any interest in the result of the suit.

2. Question. Please state if you were formerly employed by the William Cramp & Sons Ship & Engine Building Company; and, if so, during what years and in what capacity, and when such employment with said company ceased.

Answer. I was employed by the claimant company from the summer of 1887 to February, 1906, a period of nearly 19 years.
217 During that time I occupied the position of roll clerk, cost clerk, bookkeeper and chief accountant, and comptroller, in the order named. In the capacity of roll clerk, 2 years; as cost clerk, 4 years; as bookkeeper and chief accountant, 10 years, and as comptroller, 3 years. These different periods of time are approximate, but are substantially correct. My employment ceased February 22, 1906.

3. Question. What were your opportunities for knowing the condition of the claimant company's business during the period of your employment by said company, the losses, if any, sustained by said company from time to time due to unprofitable contracts, together with any financial embarrassment sustained by said claimant company due to unprofitable contracts, or otherwise; also profits, if any, made by said company upon ships undergoing construction or repair both for the Government and for outside parties? Please state fully.

Answer. My opportunities for knowing the condition (financial) of the claimant company commenced when I assumed the position of bookkeeper and chief accountant, in 1894, and extended to February 22, 1906, a period of nearly 12 years. The losses sustained by the claimant company during these 12 years, due to unprofitable

contracts, were chiefly in the building of merchant vessels, including the steamships St. Paul, Kroonland, Finland, Moro Castle, Havana, Mexico, Sierra, Sonoma, Ventura, Monmouth, the four Admirals, the oil-tank steamer built for the Standard Oil Company; also the cruiser Kassagi, built for the Imperial Japanese Government; the cruiser Variag, built for the Imperial Russian Government; the rebuilding of the steamship New York for the International Mercantile Marine Company; the Army transports Mobile and Thomas, and the pontoon Hercules. I am unable to state at this time the loss on each vessel, as nearly five years have elapsed since I have seen any data or figures pertaining thereto; but my best recollection in regard to this is that the loss on the before-mentioned vessels will aggregate upward of two and one-half millions of dollars.

The profits made by the claimant company upon ships undergoing construction during these 12 years were almost entirely realized from United States Government contracts. The profit on the S. G. B. S. Indiana, Massachusetts, cruiser Columbia, armored cruiser New York, cruiser Minneapolis, and armored cruiser Brooklyn will average from 20 to 25 per cent on the cost of construction of these vessels; on the battleship Iowa, 15 per cent; on the battleship Alabama, 10 per cent; and on the battleship Maine, little, if any, profit. The repair work was, as a rule, profitable, as was also the contracts for mining machinery built by the I. P. Morris Company, a subsidiary company, and the labor and other work done by the Kensington Shipyard Company, another subsidiary company.

4. Question. What person, if any, connected with the Cramp Company during the period in which the Indiana, Massachusetts, Columbia, Iowa, New York, and Brooklyn were being constructed by said company had better opportunities of knowing what the cost of construction of said ships amounted to, and what the net profit or loss in connection with the construction of said ships amounted to, or any of them?

Answer. I know of no person in the employ of the claimant company who had better opportunities of knowing what the cost of construction of the Indiana, Massachusetts, Columbia, Iowa, New
218 York, and Brooklyn amounted to, or anyone who was more familiar with what the net profits realized in the construction of these ships amounted to than myself.

5. Question. Please state, from your knowledge and recollection of these matters, what was the net profit to the claimant company upon the construction of the following-named vessels: The Massachusetts, the Indiana, the Columbia, the Iowa, the New York, and the Brooklyn, respectively, and you may add to this list also the Minneapolis. Either state this in round numbers, or per cent, or both.

Answer. The net profits on these vessels will have to be expressed in percentage, as so many years have elapsed since I have seen the cost figures that I am not able at this time, without refreshing my memory by referring to the books that were kept by me, to make more than a guess. I do recollect, however, that the profit on the Indiana and Massachusetts was about 25 per cent over the cost; on

the Columbia, at least 25 per cent or more; on the Iowa, 15 per cent; on the New York and Brooklyn, about 25 per cent; and on the Minneapolis at least 25 per cent. This profit included the speed premiums received from each vessel.

6. Question. If, in answer to the foregoing question, you state that there was a substantial net profit made by the claimant company upon the construction of the ships above named, or any of them, please state whether or not this was over and above any loss or damage which may have been sustained by the claimant company due to delay on the part of the Government in the delivery of the armor, as provided for in the contract "within the times and in the order required to carry on the work properly."

Answer. The percentage of profit mentioned in my answer to the previous question is the profit over and above any loss or damage which was sustained by the claimant company due to delay on the part of the Government in furnishing the armor for the vessels on which armor was installed.

7. Question. Please state whether or not you were so familiar with the claimant's books and business as to be able to know what ship contracts taken by the claimant company, outside of Government contracts, money was lost by it; or, in other words, what contracts taken by the said company were unprofitable. I mean by this, the ship contracts which were taken by said company prior to the contracts and work upon the Government ships above mentioned and contemporaneous therewith.

Answer. My knowledge of the claimant company's books was such that I knew what contracts were profitable and those that were not, and whether they were large or small contracts.

8. Question. If, in answer to the foregoing question you state there were certain ships under contract, outside of the vessels under Government contract, by the claimant company for construction, or which had theretofore been constructed by the claimant company, upon which it lost money, please state what those ships were, and what money the company lost upon same, and what effect such loss had upon the claimant company's business and credit.

Answer. As stated in my answer to your question No. 3, the claimant company lost over two and one-half millions of dollars on certain ships under contract, outside of the vessels under Government contract. These ships were the St. Louis, St. Paul, Kroonland,
219 Finland, Moro Castle, Havana, Mexico, Monmouth, the four Admirals, the oil-tank steamer, built for the Standard Oil Company, and the cruisers Kassagi and Variag, built for the Japanese and Russian Governments, respectively; the rehabilitation of the New York and the Army transports Mobile and Thomas. There were other minor contracts on which money was lost, but which I can not now recall at this time. The loss on these vessels was not offset by the profits made on other work, and the result was that the claimant company was forced to borrow money from time to time to liquidate its floating indebtedness. Its credit became impaired to such an extent that it was compelled to seek relief by making a loan of five millions of dollars from bankers in New York and

Philadelphia, through the banking house of Drexel & Co., Philadelphia.

9. Question. Please state any other or further fact or matter within your recollection which affected the claimant's credit or business, or ability to borrow money, or which tended to bring such company into financial embarrassment or distress, on or about October 5, 1894, and February 1, 1896, said dates being when certain intermediate contracts were made by and between the Government of the United States and the claimant company whereby and whereunder certain advance payments were made by the Government to the claimant company upon the contract for the construction of the Massachusetts.

Answer. The claimant company was actually losing money, as was proved by subsequent results, between October 5, 1894, and February 1, 1896. It, however, showed a paper profit during this period, on which paper profit the stockholders received a cash dividend of 8 per cent per annum on the capital stock outstanding of $4,848,000. Vast improvements and additions were made to the plant, involving an additional liability, and which could not be met when it became due. This naturally impaired the claimant company's credit, and it became necessary to seek relief by making a loan of five million dollars, which loan was secured by placing a second mortgage on its entire property.

10. Question. Kindly give the court the benefit of any and every cause of financial embarrassment which confronted the claimant company at the time said intermediate contracts were entered into by it with the Government, or October 5, 1894, and February 1, 1896, or during the contract period at any time.

Answer. The cause of the financial embarrassment between the period of October 5, 1894, and February 1, 1896, was due, in my opinion, to the following reasons: Unprofitable contracts, as before stated; payment of dividends to stockholders that were not earned; erection of new buildings and installation of new tools and machinery, for the payment of which no funds had been provided; the lack of an efficient organization, making the cost of construction more than it should have been, and the withholding by the Government of payments on the Indiana and Massachusetts.

Cross-examination:

The said witness was then cross-examined, and in answer to the interrogatories put by the notary public, testified as foll-ws:

1. Cross-interrogatory. If in answer to question 5 you say there was a profit upon the constructions of the vessels named, please state if to arrive at such profit you added the bonus or premiums for extra-speed development, and also what amount you deducted, if any, on account of indirect or overhead charges, and what you deducted for interest on the investment or interest on borrowed money?

Answer. The percentage of profit stated in my answer to question No. 5 was determined after the bonus or premium for extra-speed development had been included in the amount received for these

vessels from the United States Government by the claimant company. To answer the last part of your question clearly, relative to indirect or overhead charges, interest on investment, or interest on borrowed money, I might have to explain the manner of determining the cost. At the time of the construction of the Massachusetts, and prior thereto, and several years subsequent thereto, the claimant's cost on any contract was determined by charging labor at a small advance over actual cost; stock material, ditto, and in addition a charge was made for use of tools. These tool charges were intended to cover, and did cover, indirect or overhead charges and interest, so if a vessel cost, say five hundred thousand dollars, which would be from the result of the above process, it was understood that this vessel had borne its proportion of all overhead charges of whatever nature.

2. Cross-interrogatory. If you say you did not deduct any of such items, state why you did not, and if you say you did, state how you arrived at the amount you did deduct?

Answer. My answer to question No. 1, I believe, answers this.

3. Cross-interrogatory. Is it not a fact that the overhead or indirect charges aggregate from 12 to 14 per cent of the cost?

Answer. The overhead or indirect charges aggregate more than from 12 to 14 per cent. As a matter of fact and record, they seldom, if ever, run below 20 per cent, and go at times as high as 27 or 30 per cent.

4. Cross-interrogatory. What per cent, in your judgment, ought to be deducted for interest on investment?

Answer. This question is not clear to me.

5. Cross-interrogatory. What would be a reasonable rent for the yard during the period the Massachusetts was being built, and ought not a sum equal to that, less fixed charges, to be deducted in order to ascertain actual profits, if no per cent on investment is allowed?

Answer. A reasonable rental for the yard during the period the Massachusetts was being built might be determined in a similar manner to that which was arrived at by a board appointed by the Secretary of the Navy in 1883, in regard to claims which had then been presented by the builders of the U. S. S. Puritan, Amphitrite, and Terror, for damages occasioned by delays in the construction of said vessels, due to the Government's breach of contract. This board took the number of building slips in each yard, deducted from its gross earnings the amount of repair and other work where no slips were required, and dividing these earnings, after these deductions had been made, by the number of building slips. The result gave the earning capacity of each slip. They then took, as a net revenue, 6 per cent interest per annum on each slip. I do not know of a better or fairer way of determining a "reasonable rental," if rental is to be charged, than that as outlined above. Not having the figures or data of the claimant company, I can not state what a reasonable rent would be. Actual profits are not determined by adding to cost of construction rentals of one's own establishment. I therefore
221 do not think that a reasonable rent, less fixed charges, ought to be deducted to ascertain actual profits.

6. Cross-interrogatory. Can there be said to be any other than

paper profits, until the direct charges, indirect charges, interest on investment, or rent, is first deducted from actual receipts; in other words, unless there is a surplus, is there a net profit?

Answer. No, sir; excepting as to rent.

7. Cross-interrogatory. On this basis, was there any substantial profit on any of these vessels, aside from the bonus for speed premiums?

Answer. Yes.

8. Cross-interrogatory. Is it not true that the company was very seriously embarrassed financially on or about October 5, 1894, and February 1, 1896?

Answer. It was embarrassed, but I did not consider it "very seriously" so.

9. Cross-interrogatory. Was not that financial embarrassment largely, if not entirely, caused by the failure of the United States to pay to them large sums of money when they ought to have been paid under the terms of their several contracts?

Answer. No, sir.

10. Cross-interrogatory. During the period from November, 1890, to 1896, were not the profits on the commercial work, to building vessels, repairing vessels, and the brass foundry, very largely in excess of any losses on the building of merchant vessels?

Answer. No, sir.

11. Cross-interrogatory. During this period did not repair work average about $50,000 a month, or a profit of $150,000 a year, aggregating in the five years $750,000, and the profit from the brass foundry upwards of $50,000 a year, aggregating $1,000,000?

Answer. No, sir.

12. Cross-interrogatory. Did not that leave a net profit, after deducting all losses on commercial work, of more than a half million?

Answer. No, sir.

13. Cross-interrogatory. Did not the occupation of the yard beyond the contract period make the building of the St. Louis and St. Paul more expensive to the company; and if so, how much?

Answer. Yes, sir. I am unable to state how much it added to the cost of the St. Louis and St. Paul, as I have no figures at hand or data relating thereto in my possession.

Redirect examination:

The questions on redirect examination were then put to the said witness by the notary public, and in answer to said interrogatories said witness testified as follows:

1. Redirect interrogatory. If, in answer to cross-question 1, you state that you included the extra-speed premiums in arriving at the profit made upon the vessels, please explain whether such speed premiums are not properly a part of the profit of the vessels?

Answer. I did include the speed premiums in arriving at the profits made upon the vessels in question, and I consider that such speed premiums are properly a part of the profit.

2. Redirect interrogatory. Referring to cross-question 1, asking

you what amount you deducted, if any, on account of over-
222 head charges, state whether or not any statement of profits would of necessity include a consideration of the overhead charges?

State if, in your judgment, interest on the investment is not properly a part of the profits.

State also if interest on money is not a part of overhead charges.

Answer. All statements of profit would and should include a consideration of overhead charges, and the statement which I prepared as comptroller for the claimant company, as of date April 30, 1905, particularly sets forth the overhead and fixed charges and the amount borne by each contract and the aggregate of job work.

I do not comprehend the second paragraph of your question, redirect question 2.

Interest on money is treated by some industrial establishments as forming part of the overhead charges; by some it is not. The claimant company treats it as a fixed charge, while the Union Iron Works, in this city, where I was temporarily engaged in doing special accountancy work, treats it as an overhead charge.

3. Redirect interrogatory. If in your reply to cross-question 5 you fix any sum as a reasonable rental of the claimant company's shipyard, what portion or proportion of the sum should properly be charged to each of the vessels in suit, and what should be charged to merchant work?

If, in answer to cross-question 5, rent should be charged, explain why you so state, if the company was paying no rental upon its property.

Answer. I did not fix any sum as a reasonable rental, but stated how such proportion of rents might be determined. If rental were allowed I would not know how to differentiate between Government and merchant work. I do not think rent is a proper charge against cost of product where no rent is paid upon property.

4. Redirect interrogatory. Referring to cross-question 6, in your statement of net profit, on direct examination, state whether or not you did not include direct and indirect charges and whether there is any reason for differentiating between interest on investment and profits.

If you allow for rent when no rent was paid, kindly state if that would not come under the head of profit.

Answer. I did include direct and indirect charges in arriving at profits, but did not include interest on investment. As stated before, I did not think rent a proper charge where no rent is paid on property. If rent were charged where no rent is paid, it would be charging a fictitious sum against the profit derived on any article manufactured; in other words, a charge would be made against cost where that particular item of expense of manufacture did not exist.

5. Redirect interrogatory. Referring to cross-question 7, state if there is any reason why speed premiums should not be included in statement of profits?

Answer. I know of no reason why speed premiums should not be included in profits. The claimant company treats it as part of its

profits, and its final cost book will show that, in arriving at the final profit or loss, for any ship contract, the premium or penalty is added to or deducted from the contract price, from which in turn the cost of production is deducted, and the remainder is either profit or loss, as the case may be.

223 6. Redirect interrogatory. Referring to cross-question 8, please state whether the financial embarrassment of the claimant company in 1894 was not due in large part to the mismanagement of said company in taking unprofitable merchant contracts, and extravagance of administration generally.

If you state that the claimant company was financially embarrassed during the year 1894 and at or about the time the first of the special releases to the Government was given, was not said financial embarrassment common throughout the industrial and commercial world generally at that time; further stating whether and how much of this condition was brought about through the mismanagement of the affairs of said company through the taking of unprofitable merchant contracts, extravagance of administration, or otherwise?

Also state whether or not the Government extended substantial relief to the claimant company by advancing payments not strictly due and payable under the contracts in suit?

Answer. In 1894, the claimants had the largest volume of unfinished contracts on hand in the history of the company. Upward of 6,000 workmen were employed, and the shipyard was not adapted to employ that number of men economically or efficiently. All of the new merchant contracts were unprofitable, and especially the steamships, St. Louis and St. Paul. A large number of these 6,000 men were working overtime, impairing their efficiency, and numbers of them took advantage of the lack of discipline by not doing the amount of work required or expected of them. I can not now recall what payments the Government made, but I know that some payments were made on the Indiana and Massachusetts.

7. Redirect interrogatory. Referring to cross-question 9, if you state that the claimant company was embarrassed financially at or about the time named, are you able to state how much of said financial embarrasment was caused by the gloomy financial conditions which prevailed throughout the country generally at the time, and how much of it may have been caused by the taking of unprofitable merchant contracts, or by the extravagant administration and management of the claimant company, or by any other cause or causes?

Please state if these matters were within your personal knowledge.

Answer. The claimant company was not particularly financially embarrassed in 1894. Though it was in need of funds and a working capital to carry on this large volume of business its credit with the bankers had not become impaired to the extent of making further loans from them impossible. Their indebtedness, however, was steadily increasing, and the effects of the improper work and the inefficiency of the labor performed in 1894 was not felt so much then as it was subsequently. The financial embarrassment and stringency of the money market was very pronounced during the year 1894, though the payments on the contracts that were due and that the

claimant company had in hand were fairly well made to it, either by cash or promissory notes, no difficulty being experienced in having the notes of the International Mercantile Marine Company discounted through the brokerage firm of Charles Smith & Sons, Philadelphia.

This was all within my personal knowledge because during that time I had charge of the books and knew what was due the claimant company, and knew what their indebtedness was.

224 8. Redirect interrogatory. Referring to cross-question 9, please state whether or not a part of the claimant company's yard and plant was fitted up especially for and devoted to the construction of the merchant ships St. Paul and St. Louis, and whether or not it was possible and practicable for the claimant company to have built said vessels upon the slips which said company theretofore had and which were occupied by the ships in suit under construction for the Government?

What was the length and beam of the St. Paul and the St. Louis compared to the length and beam of the vessels in suit, approximately, and what were the facilities of slip which the company were then utilizing for the construction of the vessels in suit, as compared to the slips and facilities which it was necessary to have in order to construct the St. Paul and St. Louis?

If able, please state approximately how much money claimant company lost in connection with the construction of the St. Paul and St. Louis, giving the causes of said losses and their effect upon the claimant company's finances and credit in 1894, at or about the time the first of the intermediate contracts was entered into with the Government, whereby the claimant company agreed to release claims for damages against the Government theretofore accruing.

Answer. When the contract was entered into with the International Mercantile Marine Company for the construction of the St. Louis and St. Paul, additional real estate was purchased, and on some of its buildings and sheds were erected wherein to store and work the materials that afterwards came into the yard for these vessels. The slips were extended on which these vessels were built and piling work done to provide for the additional cribbing necessary to accommodate these vessels. My recollection is that these vessels were built on the same slips on which the Government vessels were built, except that the cribbing was extended to accommodate the increased length.

The length of the St. Louis and St. Paul was 535 feet, and beam 63 feet; the Indiana and Massachusetts were, length 349 feet, and an extreme breadth of 69 feet. The slip facilities of the yard were about the same when the St. Louis and St. Paul contracts were signed; practically the only addition made to these slips was to extend two of them to accommodate these two vessels, namely, the St. Paul and St. Louis.

The claimant company lost over seven hundred thousand dollars on the building of the St. Paul and the St. Louis. The causes of these losses were due, in great part to the reasons I have stated in my answer to question No. 6, redirect examination, namely, inefficiency of organization, inability to work 6,000 men or more econom-

ically in a yard of the capacity of the claimant company, overtime made by workmen, impairing their efficiency, and lack of discipline.

The examination being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says: "I have no further information to impart."

THOMAS J. LEGER.

225 *g. Memorandum Showing Hearing on Cause, etc.*

On February 13 and 14 1911 Mr. John C. Fay was heard for the claimants. On February 14 and 15, Mr. Franklin W. Collins was heard for the defendants. On February 16, Mr. Fay closed for the claimants and the case was submitted.

226 *h. Order Overruling Claimant's Motion for New Trial. Filed May 29, 1911.*

The claimant's motion for a new trial is overruled, the motion to amend the findings is allowed in part and overruled in part, the former findings of fact are withdrawn and new findings filed and it is ordered that the judgment dismissing the petition stand. The opinion of the Court by the Chief Justice was filed. Judge Howry filed a dissenting opinion.

227 *Stipulation with Respect to Contents of Transcript of Record on Appeal, Filed Jan. 29, 1914, and Order of Court Thereon, Entered January 30, 1914,*

Whereas one of the questions raised in this cause by the claimant and decided by the judgment entered herein May 29, 1911, is the right of the claimant to equitable relief through the reformation of the contract in suit and the reformation of certain releases which the claimant executed thereunder;

And whereas, by leave of court, evidence was introduced on behalf of both parties touching the facts on which the claimant founded its said claim for equitable relief, subject, however, to the defendant's objection that all of the evidence offered in relation to that question was incompetent and inadmissible.

And Whereas the record herein is very voluminous and contains the report of many proceedings and much evidence which is not relevant to the question of the claimant's right to equitable relief as aforesaid, and the claimant has filed a designation enumerating certain portions of the record, including the evidence which the claimant deems to be relevant to that question and necessary for its determination on appeal by the Supreme Court of the United States;

It is hereby Stipulated and Agreed that, in addition to (1) the petition, (2) general traverse, (3) findings of fact and conclusion of law filed May 29, 1911, (4) opinion of the court (Peelle, C. J.) and dissenting opinion (Howry, J.) filed May 29, 1911, (5) judgment

dismissing the petition, entered May 29, 1911, (6) claimant's application for appeal filed July 27, 1911, allowed January 5, 1914, the clerk of this court may include in the transcript of record on appeal, the following:

(*a*) Defendant's motion to dismiss, filed June 19, 1907.

(*b*) Memorandum of the fact that the cause was heard,
228 findings filed, and judgment entered dismissing the petition, May 16, 1910.

(*c*) Claimant's motion for New Trial and for the amendment of findings, filed May 20, 1910.

(*d*) Order remanding cause, etc., entered June 9, 1910.

(*e*) Evidence adduced by the claimant as follows:

Deposition of Benjamin F. Tracy, taken at New York, September 18, 1907.

Memorandum of agreement referred to.

Deposition of Lewis Nixon, taken at Washington, D. C., September 27, 1907.

Deposition of Charles Eaton Creecy, taken at Washington, D. C., September 30, 1907.

Deposition of Hilary A. Herbert, taken at Washington, D. C., October 7, 1907.

Deposition of Philip Hichborn, taken at Washington, D. C., November 6, 1907.

Deposition of Charles H. Cramp, taken at Devon, Pa., July 29, 1907, including Exhibit C. H. C. No. 1.

(*f*) Evidence adduced by the defendant as follows:

Deposition of William E. Chandler, taken at Boston, Mass., September 22, 1910.

Deposition of Robert E. Logan, taken at Washington, D. C., September 20, 1910.

Deposition of William H. Stayton, taken at Washington, D. C., September 6, 1910.

Deposition of Pickens Neagle, taken at Washington, D. C., September 7, 1910; together with the Exhibits referred to.

Stipulation of counsel, November 18, 1910.

Deposition of Thomas J. Leger, taken at San Francisco, on written interrogatories and cross-interrogatories, December 5, 1910.

(*g*) Memorandum showing hearing of cause on claimant's motion for new trial, etc., February 13, 14, 15 and 16, 1911.

(*h*) Order overruling claimant's motion for new trial and allowing in part and overruling in part motion to amend findings, filed May 29, 1911.

(*i*) This stipulation.

229 Provided, However, that on appeal recourse shall be had to the record of the proceedings and evidence next hereinbefore mentioned, for no purpose whatever, except for the consideration and determination of the question with respect to the claimant's right to the equitable relief aforesaid; it being understood and agreed that the Findings of Fact filed by the court May 29, 1911, shall not be affected in any other manner or for any other purpose by the said proceedings and evidence.

In stipulating that the evidence of certain witnesses for the claimant and for the Government shall be included in the record, Government's counsel expressly reserves and renews the objection made at the time said testimony was taken, as to the incompetency and inadmissibility of the same.

JAMES H. HAYDEN,
Attorney for Claimant.
HUSTON THOMPSON,
Assistant Attorney General.
F. W. C.

Order of Court on Above.

The clerk will certify the parts of the record mentioned in the within stipulation and the motion is allowed for the purposes only expressed in the stipulation.

EDWARD K. CAMPBELL,
Chief Justice.

January 30, 1914.

230 Court of Claims.

No. 20861.

WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the foregoing are true copies of evidence, for the claimant and defendants, and of sundry interlocutory proceedings had in the hearing of the case, as set out in the accompanying stipulation of the parties in the case.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 30 day of January A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,042. Court of Claims. Term No. 350. The William Cramp & Sons Ship and Engine Building Company, appellant, vs. The United States. Filed February 2d, 1914. File No. 24,042.

No. 350. 63

October Term, 1914.

Office Supreme Court, U. S.
FILED
MAR 18 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,
Plaintiff-in-Error.

vs.

THE UNITED STATES,
Defendant-in-Error.

APPEAL FROM JUDGMENT OF COURT OF CLAIMS.

PAPER BOOK ON BEHALF OF PLAINTIFF-IN-ERROR.

JOSEPH GILFILLAN,
Attorney for Plaintiff-in-Error.
West End Trust Building,
Philadelphia, Pa.

M. D. WOOD PRINTING COMPANY, PHILADELPHIA.

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 350. October Term, 1914.

THE WILLIAM CRAMP & SONS' SHIP AND ENGINE BUILDING COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

APPEAL FROM JUDGMENT OF COURT OF CLAIMS.

PAPER BOOK ON BEHALF OF PLAINTIFF IN ERROR.

(1) STATEMENT OF THE CASE.

Plaintiff in error contracted with the Government to built the battleship Massachusetts. The completion thereof was delayed, through fault on the part of the Government for 2 years 6 months and 9 days, imposing upon the builder damages as found by the Court of Claims in the sum of $216,224.27.

Suit was begun in the Court of Claims asking for judgment in this amount. During the period of the delay occa-

sioned by the Government as aforesaid, to wit, on October 5, 1894, under a supplemental written contract, the damages for the delay up to that time were adjusted by the parties, the Secretary of the Navy compelling the plaintiff in error to relinquish its claim for damages up to that time in order to get the payments due it under current estimates; and again a similar adjustment for the same reason was made by a second supplemental written contract on February 1, 1896. As to that part of the damages suffered after February 1, 1896, and up to the time the vessel was completed, to wit, on May 29, 1896 (a period of 3 months and 29 days) the Court of Claims has found that the builder suffered damages in the sum of $27,984.99. On November 23, 1896, a release was executed by the builder to the Government covering all claims and demands for or by reason of or on account of the construction of the vessel under the original contract. The individuals representing the builder and the Government both testified, without contradiction, that the claim of the builder for unliquidated damages for the delay thus occasioned by the Government was not within their contemplation when the release was given or executed, and that it was their intention that the release should apply only to the builder's claims for compensation due for the building of the vessel as provided in the contract. The Secretary of the Navy, the representative of the Government in this transaction, on December 9, 1896, recommended to Congress the reference of this claim for unliquidated damages to the Court of Claims for adjustment. The Court of Claims held that the builder's rights were fixed by the wording of the written release, and held that as a matter of law the testimony of the witnesses, substantially reported by the Court of Claims in its Finding XIII, did not effect the interpretation of the written release. The claim was dismissed, and judgment having been entered for the Government the case is brought to this Court on appeal.

(2) SPECIFICATIONS OF ERROR.

(1) The Court of Claims erred in basing the rights of plaintiff in error to be compensated for damages suffered by delay occasioned through the fault of the defendant in error in the construction of the battleship Massachusetts during the period from February 1, 1896, to May 29, 1896, upon the wording of the release dated November 23, 1896, executed by plaintiff in error, without regard to the verbal evidence in the case.

(2) The Court of Claims erred in not finding from the verbal and documentary evidence in the case that the release made November 23, 1896, by plaintiff in error had no application to unliquidated damages occasioned in the construction of the battleship Massachusetts through the fault of defendant in error, to the extent that the same were suffered during the period from February 1, 1896, to May 29, 1896.

(3) The Court of Claims erred in finding:

"XIII.

"The claimant company submits for the consideration of the court the evidence of the then Secretary of the Navy and the president of the claimant company, who signed the contract on behalf of their respective principals, along with certain other testimony, taken since the decision in the case of the Indiana, to prove that at the time of the signing of the contract as aforesaid it was not within the minds of the parties so signing said contract that the language of paragraph six of the nineteenth clause of said contract, to wit: 'On the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy,

of all claims of any kind or description under or by virtue of this contract,' should embrace claims for unliquidated damages of the character herein sued for, and that in so far as the language of said final release includes such unliquidated claims it was inserted by mistake, inadvertence, or accident, and did not express the true intent of the parties, and that the same should be so reformed as to exclude such claims."

"The Court, after due consideration of the evidence aforesaid as well as the evidence adduced on behalf of the defendants, finds that there was no mutual mistake between the parties in the execution of the contract or the releases thereunder; that the language of said contract and releases expressed the intention and purpose of the United States as previously agreed upon, though the contracting party on behalf of the claimant company may have mistaken its legal rights thereunder."

(4) The Court of Claims erred in making the following conclusion of law:

"Upon the foregoing findings of fact the Court decides, as a conclusion of law, on the authority of the case of United States v. William Cramp, etc., Company (206 U. S., 118), that the claimant is not entitled to recover, and its petition is therefore dismissed."

(5) The Court of Claims erred in not entering judgment in favor of plaintiff in error against defendant in error for $27,984.99, the amount of damages occasioned in the construction of the battleship Massachusetts through the fault of defendant in error to the extent that the same were suffered by plaintiff in error during the period from February 1, 1896, to May 29, 1896.

(3) BRIEF OF ARGUMENT.

These proceedings were begun in the Court of Claims by complaint averring the builder's performance of its undertaking to construct the battleship Massachusetts in accordance with the provisions of the contract of November 19, 1890. The contract time for completion, to wit, November 19, 1893, was extended by the fault of the Government for a further period of 2 years, 6 months and 9 days, to May 29, 1896, and for the damages imposed upon the builder by the delay in completion, money damages were asked. The complaint also shows the execution by the builder of two intermediate releases to the Government covering the responsibility of the Government for this delay up to the dates of the execution of these intermediate releases, which were respectively October 5, 1894, and February 1, 1896. The complaint pleads avoidance of these intermediate releases upon the ground of coercion and duress. No mention is made in the pleadings of the execution by the builder of the so-called final release of November 26, 1896, and compensation is sought, in affirmance of the contract, for the damages consequent upon the delay on the part of the Government in the performance of its duties under the contract. The contract itself, in paragraph 3, contained provisions in anticipation of delay occasioned by the Government. These provisions, however, were not observed when the delay was in fact caused, the Government electing to disregard the rights given the builder under the provisions of paragraph 3 in case of delay, and in spite of the delay so caused within the provisions of this paragraph, insisted upon the contract being performed by the builder as though no delay had been occasioned by the Government. Therefore the breach of the contract on the part of the Government is a fundamental admitted fact in this case.

In the Court of Claims the record papers show that

the builder's case was presented in the shape of an application to reform the two intermediate releases and also the final release of November 23, 1896, so as to permit recovery for the unliquidated damages caused the builder through the Government's delay. This relief being denied this appeal was taken, and by stipulation the testimony of the witnesses was certified as part of the transcript, in order to determine whether the builder was entitled to the relief asked.

In its simplest terms this suit might be regarded in the first instance as a suit at law for money damages in affirmance of the contract. The Government's defence to that part of the builder's claim which accrued after February 1, 1896, the date of the second intermediate release, was a plea of payment evidenced by the final release of November 23, 1896, and the legal effect of this paper was attacked in rebuttal by verbal evidence offered by the builder. Whether the attempted avoidance of the release was presented in the form of an application to reform that instrument (or the provisions of the contract under which it was required), or in the form of verbal evidence to show the scope of that release, is immaterial.

In reviewing this final decree in equity this Court is not limited to the findings and the conclusions of the Court of Claims. The litigation was brought about under the Act of Congress of June 30, 1897, providing:

> "The Secretary of the Navy is hereby authorized and directed to examine claims against the Government which may be presented to him by contractors for the building of the hulls or machinery of naval vessels under contracts completed since January 1, 1891, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but

were due to the action of the Government, and report to the next session of Congress the result of said investigation, and where said claims are in his opinion subject for the jurisdiction of the Court of Claims, or for the action of Congress upon the same."

(Transcript of Record, page 82.)

In pursuance of this act, Mr. Herbert, the then Secretary of the Navy, having before him the builder's letter of September 30, 1896, presenting its claim for losses and damages due to the Government's failure to deliver the armor and armament of the Massachusetts within the time and in the order necessary to carry on the work properly (Transcript of Record, page 92), reported to Congress seventeen days after the receipt of the builder's letter of complaint, recommending the reference of the builder's claim to the Court of Claims. (Finding VII, Transcript of Record, page 24.) In making this recommendation Mr. Herbert made no reference to the builder having executed any final release. In such a case this Court has said it will not confine itself to an examination of the correctness of the findings and conclusions reported to it by the Court of Claims upon an appeal, but will independently examine all of the evidence for the purpose of doing justice upon the whole claim.

In United States vs. The Old Settlers, 148 U. S., 427, appeals were taken from a decree of the Court of Claims passing upon certain Indian land claims. The Court of Claims filed findings of fact and conclusions of law and declined to send up the evidence. In delivering the opinion of the Court, Mr. Chief Justice Fuller said:

"The remedy in equity in cases of account is generally more complete and adequate than it is or can be at law, and we regard the language of the

> Act of Congress as manifestly used with the intention that equity powers should be exercised in the disposition of the case. It was upon this view that we directed the certiorari to issue, and in arriving at our conclusions, while we have had the advantage of the findings of the Court of Claims, we have considered and determined the case for ourselves upon an examination of the entire evidence."

In support of this conclusion the opinion refers to the decision of Harvey vs. United States, 105 U. S., 671, where the Court of Claims had refused to reform certain terms of a contract upon the ground of accident or mistake, and a subsequent act had been passed sending back the claim for adjudication. On appeal from the decision of the Court of Claims in this case last cited it was contended on the part of the Government that the appeal could not be heard, because there was not in the record "any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts," but the opinion of Mr. Justice Blatchford said:

> "The rule in reference to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act, and in such a case where an appeal lies and is taken under Section 707 of Revised Statutes this Court must review the facts and the law as in other cases in equity appealed from other Courts."

If the case at bar be regarded as substantially a matter at law, the correctness of the Court of Claims' findings is open for review upon all the evidence. Finding XIII concludes: "The Court, after due consideration of the evi-

dence aforesaid, as well as the evidence adduced on behalf of the defendants, find" * * * "that the language of said contract and releases expressed the intention and purposes of the United States as previously agreed upon," * * * . In other words, it disregarded the verbal evidence on behalf of the builder and held that the rights of the parties were to be governed entirely by the language of the written final release. This conclusion coming at the end of Finding XIII, is based upon the facts recited in the first part of said finding, which were as follows: "The claimant company submits for the consideration of the Court the evidence of the then Secretary of the Navy and the president of the claimant company, who signed the contract on behalf of their respective principals, along with certain other testimony" * * * "to prove that" * * * "in so far as the language of said final release includes such liquidated claims it" * * * "did not express the true intent of the parties," * * * In using these words the Court of Claims has summarized the effect of the verbal evidence offered on behalf of the builder, so that the effect of this finding is to justify a conclusion upon the evidence which is set out in the same finding as contains the conclusion. In such a case this Court has said it will look into the evidence to see whether this summarization is correctly made and whether it supports the conclusion based thereon by the Court of Claims.

In United States vs. Clark, 96 U. S., 37, arising on appeal from the Court of Claims, a paymaster had asked an allowance upon his account for moneys of which he was robbed. The Court of Claims found certain facts and sent with the record the evidence on which the facts were found. In its findings the Court of Claims reported that the claimant had been robbed of the Government's money in a certain sum, and in the evidence returned by the Court of Claims with its finding it appeared that the only justification for the finding as to the amount of the money so

lost was the record of a court marshal proceeding. In delivering the opinion of the Court Mr. Justice Miller said:

> "But we are of opinion that when that Court has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the Court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the Court itself, there is ANY EVIDENCE to support its verdict; that is, its finding of the ultimate fact in question."

Even though the inquiry in this Court be confined to the very findings of fact made by the Court of Claims and its conclusions thereon as stated above from Finding XIII, the correctness of the decree that refuses to interpret the final release in the light of the verbal evidence, requires review by this Court. As part of its Finding XIII the Court of Claims has reported that there was submitted to it evidence of witnesses giving and accepting the final release that the language of said final release "did not express the true intent of the parties," and in spite of this finding upon the evidence the Court of Claims has concluded "that the language of said contract and releases expressed the intention and purposes of the United States as previously agreed upon." The question is therefore squarely raised on the findings of the Court of Claims

whether the builder's right to compensation is governed exclusively by the wording of the final release.

The words used by the Court of Claims "as previously agreed upon" have reference to paragraph 6, article 19, of the contract under which this vessel was built (Transcript of Record, page 16), wherein certain payments were made "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract." The contract in suit is in the same words as the contract which was involved in the litigation between the same parties that arose over the building of the battleship Alabama. It was held in the opinion of this Court upon the litigation over the Alabama, which is reported in 216 U. S., 494, that the Secretary of the Navy, under this clause of the contract, had power to prescribe a form of written release which would omit from its operation the builder's unliquidated claims for damages suffered through delay occasioned by the Government, so that the present case involves not a question of power but of evidence.

The main question that is raised by this appeal is, assuming that such an exception from the final release as is here sought to be asserted can be made by the Secretary of the Navy by a writing incorporated in the release, can such an exception be made by him verbally? The answer involves an inquiry into the extent and effect of verbal evidence modifying the *prima facie* meaning of a written instrument. It is too well established to require argument that no court of justice will permit a writing to be used to effect a fraud in violation of a verbal understanding which is admittedly part of the transaction in which the writing is executed, if the disregard of such verbal understanding would be the means of perpetrating a fraud upon the party executing the writing. Without admitting verbal evidence to change the meaning of writ-

ten words the law permits verbal evidence to show what was the subject matter upon which the words of the written instrument were to operate. This principle is thus expressed by Mr. Justice Field, in delivering the opinion of the Court in Peugh vs. Davis, 96 U. S., 332, holding, upon appeal from the District Court of Alabama, that verbal evidence converted an absolute deed into a mortgage:

> "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. ' As the equity, upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice."

In Brick vs. Brick, 98 U. S., 514, it was held, quoting the above language from Peugh vs. Davis, that parol evi-

dence was improperly excluded by the Supreme Court of the District of Columbia in an attempt to prove that a certificate of stock had been issued as security for a loan and not upon a purchase.

These cases are only illustrative of a long line of decisions, among which is Cabrera vs. American Bank, 214 U. S., 224. On appeal from the District Court of Porto Rico it was held that a bill of sale purporting on its face to have been given in discharge of a debt was really intended to give the creditor additional security. Upon the general law on this subject Mr. Justice McKenna, in delivering the opinion of the Court, said, in approving the contention of the appellants under the law of Porto Rico:

> "But these are also the principles of the common law, and absolutely necessary if the written instrument is to be given a distinctive sanction of the agreement of the parties. But there are well-recognized exceptions. The face of an instrument is not always conclusive of its purpose. In equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

The application of this principle is also seen in the decision of the Alabama case between the parties to this suit, arising on a contract in exactly the same words as the contract at bar, and where all the words of the final release in the case at bar were included in the final release that was involved in the Alabama case. Of course the

final release in the Alabama case contained a provision which does not appear in the final release in the case at bar, but nevertheless in delivering the opinion of the Court Mr. Justice Brewer, in construing the terms of the contract and the provisions of the final release, made extended reference to the correspondence passing between the builder and the Secretary of the Navy, and this was used in determining the interpretation to be placed upon the release and the proviso as involved in the cited case.

The only persons having personal knowledge of the transaction which occurred between the parties to the suit at bar when the final release was executed, are Mr. H. A. Herbert, the then Secretary of the Navy, and Mr. Charles H. Cramp, the then president of the building company. Mr. Cramp gave the receipt and Mr. Herbert received it, and both of these parties have testified that the subject matter of the transaction was the release of the builder's claims for compensation for work and materials furnished in constructing the battleship under the provisions of the contract, and that there was no thought in the minds of either of the parties to the release that the unliquidated claim of the builder for damages caused by the Government's delay was to be included within its scope. Mr. Herbert testified (Transcript of Record, page 93):

> "If I had also thought that the final receipt was in itself intended to cover all claims for damages on account of delay in the construction of these vessels, I would also have called attention to that receipt. For these reasons I feel confident that in that letter I ignored the final receipt, because I did not think it was like the releases to which I called specific attention and not a final release of all damages that had heretofore accrued."

Mr. Cramp testified (Transcript of Record, page 120):

> "3. Question. When you signed the release in November was there any understanding or agreement or suggestion either on the part of the Secretary of the Navy or your company that that receipt was to cover in any manner the claim that had been submitted by you on the 30th of September, 1896?"
>
> "Answer: Not by any means."

The testimony of Mr. Herbert is corroborated by the facts found by the Court of Claims, in that 19 days after the execution of the alleged final release he made a report to Congress, in pursuance of the requirements of the Act of June 10, 1896, recommending the reference of the builder's unliquidated claims for damage to the Court of Claims (Transcript of Record, page 24).

It may also be stated that the Secretary of the Navy did provide for and pay for similar claims in connection with the construction of the Battleship Oregon, which was known as seagoing Battleship No. 3. The supplemental contract covering the same, between B. F. Tracy, Secretary of the Navy for the United States, and the Union Iron Works, being found Transcript of Record, pages 62-65. This course of conduct on the part of the then Secretary of the Navy emphasizes and corroborates the contention in this case that the Secretary who signed the contracts believed that the extra expense resulting from delay should have been paid for in addition to the contract price, and that neither Mr. Cramp nor the then Secretary of the Navy, Mr. Herbert, at the time the final release was signed, thought or intended that the plaintiff in error had in any way jeopardized or interfered with its right to claim for the extra expense for which this suit is brought.

Neither the findings by the Court of Claims nor the testimony taken by either party and sent up with this record, show any evidence in contradiction of the testimony above quoted, by Mr. Herbert and Mr. Cramp. Therefore the case at bar is not within any of those numerous decisions holding that the lower court is primarily the tribunal that should determine the weight of evidence where an attempt is made to avoid the effect of a written instrument by verbal evidence which is contradicted by the party endeavoring to sustain the writing.

When reference is made to the binding character of a finding of fact made by a Master or a Court, it means that there is evidence upon which the finding can rest. That is to say, the Master or the Court having had an opportunity to both hear and see the witnesses, can determine on which side the truth lies, but there must be some evidence on which to rest the Master's finding. If there is in effect no evidence to support his finding, then the finding has no binding force and the Court will reverse such finding as a matter of course. It is only in the case of conflicting testimony that the finding of the Master or the Court is entitled to the weight that is usually accredited to it. This principle is well illustrated in the case of Grauel vs. Wolfe, 185 Pa. St. Rpts., page 83, where the Court, in its opinion, said:

> "It may be stated as a general principle that where the evidence is conflicting and the credibility of witnesses is involved, a Master's finding upon a question of fact is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it is clearly and palpably against the weight of the testimony. If, however, his finding is a deduction from undisputed facts, or from uncontradicted and credible evidence, the controlling reason for the application of this principle is not

present, because in such a case he has no greater facilities for reaching a correct conclusion than the Court has in passing upon the exceptions to his report."

If the two opposing parties who signed the paper agree that the paper did not cover unliquidated damages, then the Court's finding that the opposite is the truth, has no controlling effect.

In the case at bar the Government's representative testifies, as does the president of the building company, that the release of the unliquidated damages from the Government's delay was not the subject matter of the transaction represented by the final release in the case at bar, and therefore it would be a clear fraud to permit the release to be used or applied to a purpose which was not in the minds of the parties who consummated the transaction. Though there may be grounds for the Court of Claims having concluded that the question of damage to the builder from the Government's delay, to the extent that it was incurred prior to February 1, 1896, the date of the second intermediate release, was eliminated by the execution of the supplementary agreement of that date, yet the verbal testimony proves without contradiction that the final release had no application to the damages that were incurred after February 1, 1896, and it is therefore respectfully submitted that in disregarding the uncontradicted verbal evidence in the case and adjudicating the builder's rights for compensation for damages accruing after February 1, 1896, upon the wording alone of the final release of November 23, 1896, the Court of Claims was in error. The Court of Claims having found that the damages occasioned by the Government's delay to the extent that they were suffered by the builder after February 1, 1896, are $27,984.99 (finding XIII, Transcript of Record, page 26), it is not necessary that the case should be returned to the Court of Claims

for further proceedings. It is submitted that judgment should be entered in favor of the builder against the Government for the sum of $27,984.99.

JOSEPH GILFILLAN,
Attorney for Plaintiff in Error.
West End Trust Building, Philadelphia, Pa.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT, v. THE UNITED STATES. } No. 63.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Suit was brought in the Court of Claims by the William Cramp & Sons Ship and Engine Building Company to recover $483,757.49 for loss and damages alleged to have accrued by reason of delays occasioned by the Government in connection with the construction of the battleship *Massachusetts*.

From a judgment dismissing the petition this appeal was taken, assigning as error the refusal of the court to enter judgment in the sum of $27,984.99, the amount of cost and expenses claimed for the period from February 1, 1896, to May 29, 1896. (Finding XII, Rec. p. 26.)

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On the 18th day of November, 1890, the United States, through Gen. B. F. Tracy, Secretary of the Navy, entered into a contract with the William Cramp & Sons Ship and Engine Building Company for the construction of said battleship *Massachusetts*, at a total cost of $3,063,000, the same to be completed and delivered within three years from the date of the contract. The United States agreed to furnish the armor equipment within the times and in the order necessary to carry on the work properly, and appellant was to place and secure said armor equipment to the vessel. The Government was delayed in delivering this material for two years six months and nine days, and accordingly extended the period of completion a corresponding time, thereby releasing appellant from the penalties provided for in the ninth clause of the contract.

Upon the final completion and delivery of the vessel on November 29, 1896, the balance of the amount due was paid over to appellant, and, as required by the terms of the contract, the latter simultaneously released and forever discharged the "United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law or in equity for or by reason of or on account of the construction of said vessel, under the contract aforesaid." (Rec. p. 23.)

Appellant contends that it was the understanding of the Secretary of the Navy, who executed the ~~contract~~ release for the United States, and Mr. Cramp,

the president of the contracting company, that the release did not discharge the United States from liability for unliquidated damages; that this understanding was mutual, in that the wording of the release did not express the true or complete idea of either party to the contract; that therefore the Court of Claims should have reformed the release so as to exclude from it any question of the right to unliquidated damages on the part of claimant for delays of the Government during the period from February 1, 1896, to May 29, 1896, and that appellant should recover damages caused thereby.

The Government maintains that the release is unambiguous and all-comprehensive, and its language releases and discharges the Government from all claims; that it is responsive to section 6, article 19 of the contract, which provided that when all the conditions, covenants, and provisions of the contract had been performed and fulfilled, the company should receive the "special reserve" or the surplus, if any, of the "reserve fund" to which it might be entitled, "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract" (Rec. 16); that thus the release, being responsive to the contract, action on the part of the Government requiring it can not under any theory be termed "duress," and the intermediate releases of the appellant to the Government became immaterial, as the final release relieves the Government of all

claims whatsoever; that the evidence demonstrates that appellant knew there was to be no such exception with respect to unliquidated damages; that instead of suffering a hardship from carrying out the contract with the Government, as appellant asserts, it was receiving a profit of from 20 to 25 per cent (evidence of Thomas J. Leger, Rec. 208); and that therefore appellant has no ground for complaint from any viewpoint.

BRIEF OF ARGUMENT.

First. The release comprehended all claims.

Second. The language of the release clearly expressed the intention of the contracting parties, and being responsive to the terms of the contract, eliminates questions of mutual mistake or duress.

Third. The evidence, though not reviewable, and not admissible, demonstrated that there was no mutual mistake.

I.

The release comprehended all claims.

Section 6, paragraph 19 (Rec. p. 16) of the contract is as follows:

> When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," *or so much of*

> *either as it may be entitled to on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.* [Italics ours.]

Appellant contends that Mr. Tracy, the Secretary of the Navy when the contract was signed, and Mr. Cramp, the president of the company, had mental reservations about the meaning of the releasing words of the contract, which should have saved to appellant the right to claim unliquidated damages. Evidence was introduced purporting to disclose these mental reservations.

It is also contended that Mr. Herbert, Secretary of the Navy when the releases were signed, had such reservations. He testified (Rec., p. 93):

> If I had also thought that the final receipt was in itself intended to cover all claims for damages on account of delay in the construction of these vessels, I would also have called attention to that receipt.

Mr. Cramp testified (Rec., p. 120) that when the release was signed there was no understanding, agreement, or suggestion, either on the part of the Secretary of the Navy or his company, that the receipt was to cover in any manner the claim that had been submitted by him on the 30th of September, 1896.

The Government's position is that regardless of the understanding of the individuals who signed these documents, or what they may have thought, the final release covers all claims of any kind or nature what-

soever from the inception of the contract to its completion.

In the case of the *United States* v. *Wm. Cramp & Sons Co.* (206 U. S. 118, 127) growing out of a contract, the terms of which were practically identical with those here considered, Mr. Justice Brewer, delivering the opinion of the court, held that the language included "every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government."

There are two other intermediate releases that are referred to in the findings, evidence and opinion, one executed on October 5, 1894, and the other February 1, 1896. (Rec. pp. 21, 22.) The Government considers any discussion of these as immaterial for the reason that the final release of November 26, 1896 (Rec. p. 16), relieved the Government of all claims. It has been urged by appellant that the intermediate releases were obtained through "coercion and duress." Under the Government's theory this contention is of no importance for the reason that the terms of the contract (Rec. p. 16) called for a final release of all claims of any kind or description under or by virtue of the contract.

In passing, it may be said that in the case of both of the intermediate releases a consideration moved from the Government to the company, to wit, the paying of money when it was not required by the contract, and therefore it could not be said that there was any duress practiced by the Government.

II.

The language of the release clearly expressed the intention of the contracting parties, and being responsive to the terms of the contract, eliminates questions of mutual mistake or duress.

Can language more clearly express an intention to include all claims than that in the sixth paragraph of the nineteenth clause hereinbefore set forth? As said by Mr. Justice Brewer in the *Cramp case* (supra, 128):

> The number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.

It can not be contended that there was any misunderstanding in the language of the contract at the time it was executed. There was no prior valid contract differing from it alleged in the petition or even claimed to have been considered and discussed between the parties. Moreover, the record is silent as to any proofs to sustain such a contention. If therefore the language of the contract is clear and so obvious as to be impossible of other meaning than the releasing of all claims, and there was no prior mutual contract contemplated, can it be claimed that there was any misunderstanding of the language in the release, or any duress practiced by the Government, when the release was in form and substance responsive to the contract? The only way that any other intention could have been expressed would have been by

the insertion of a proviso in the release, excepting from its terms the claims to be exempted, as was done in the case of *United States* v. *William Cramp & Sons Ship and Engine Building Company* (216 U. S. 494), where a contract similar to the one here considered was reviewed. In that case there was a proviso "that this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain." It was held that this clause reserved to appellant the right to sue for unliquidated damages, but the court said in substance (p. 503) that had it not been for the proviso "a release executed in accordance with the terms of the contract [the language being identical with that in the case at bar] would have extinguished all claims of the company against the United States growing out of the contract."

It therefore becomes evident that something more than a verbal communication from one party to the other was necessary in order to have exempted claims for unliquidated damages.

It is indisputable that there was no mutual mistake of fact at the time of the execution of the release. The language of the release being in conformity with the language of the contract, any mistake must have been in a misunderstanding of the legal effect of the words of the release; but this would be a mistake of law, and a mistake of law is not excused. Having once executed the release, appellant can not now be relieved from its terms on the ground that the effect

is different from what it expected. It must be shown that both parties had a different intention from that expressed in the contract, which intention was communicated to each other, but by mistake was improperly expressed.

In the case of *Hudson Canal Co.* v. *Pennsylvania Coal Co.* (8 Wall. 276, 290) Mr. Justice Clifford, delivering the opinion of the court, said:

> Courts of law can not incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument, and none of the authorities cited by the parties in this case, when properly applied, are inconsistent with the views here expressed.
>
> Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement. Language to express any such contract is entirely wanting in the instrument, nor is there any covenant on the part of the plaintiffs from which any such implication can legally arise.

III.

The evidence, though not reviewable and inadmissible, demonstrated that there was no mutual mistake.

A stipulation was signed by the Government at the request of appellant (Rec. p. 216) permitting evidence in the case to be incorporated in the record, with the proviso that the Government reserved the right to renew the objections made at the time the testimony was taken. The Government signed this stipulation out of respect to the opinion of the court, in which it said (Rec. p. 32):

> But as the reformation of a contract is an equitable proceeding, and the Supreme Court reserves to itself the right, if deemed competent and material, to examine and review the evidence independent of the findings, we deem it necessary to review the evidence—in the main matter of opinion—or give the substance thereof.

The court, however, found (finding 13, Rec. p. 26):

> The court, after due consideration of the evidence aforesaid as well as the evidence adduced on behalf of the defendants, finds that there was no mutual mistake between the parties in the execution of the contract or the releases thereunder; that the language of said contract and releases expressed the intention and purpose of the United States as previously agreed upon, though the contracting party on behalf of claimant company may have mistaken its legal rights thereunder.

In view of this finding the Government maintains that the testimony in this case is not reviewable and that the findings are final. Nevertheless, if this court should decide to review the evidence, appellee calls its attention to and renews the objections made at the time the testimony was taken. The Government further maintains that should the evidence be considered, it also demonstrates that there was no mistake of fact on the part of appellant or the Government as to the release including claims for unliquidated damages.

Mr. Cramp, president of the appellant company, in response to question 13 as to whether he protested against the signing of the final release, said:

> I did protest against signing all the releases, because on account of the method put to us—I mean that I felt that *it was a "holdup," and I always protested both on the method—and I lost my temper frequently because the thing was so unjust and arbitrary.* (Rec. p. 127.) [Italics ours.]

If Mr. Cramp believed that the final release did not cover the claims made in this suit, why did he feel "that it was a 'hold-up' " and the Government was unjust and arbitrary in asking him to sign the same? His testimony is utterly inconsistent with the position he now takes, that the parties to the contract never contemplated that the final release was to include unliquidated damages and, in fact, demonstrates that he believed it did.

Gen. Tracy testified on behalf of appellant some 17 years after the execution of the contract, when asked, over objection, what claims he understood were to be covered by the release described therein:

> I did not understand that the party of the first part was to be called upon as a condition of receiving the contract price to be paid for the construction of the ship to release any claims that he might have against the Government for a breach of the contract on the part of the Government. (Answer to q. 7, p. 52.)

It will be seen that this answer avoided the question and was not responsive thereto. Both question and answer, of course, were objected to by the Government.

On cross-examination the witness stated:

> Answer. In the first place, according to my own impressions now, the contract was *a stereotyped form* of contract that was used in the department and was adopted without any question. (Answer to XQ. 18, Rec. p. 55.)

Is it too much to say that when this contract came to Gen. Tracy for signature he adopted it without question and did not scrutinize it or dwell upon the possible shades of meaning? It would seem so, for again on cross-examination he was asked:

> I just wanted to know how much of this you actually carry in your memory of the transaction itself at the time it occurred, and not what your present ideas with relation to the construction of the clauses of the contract

are; in other words, I want you to differentiate between your present understanding, if possible, of these matters and your understanding at the time that occurred.

A. I do not suppose at the time of the signing of that contract that the question of what damages the contractor might sustain by reason of the Government's failure to perform the contract on its part *was considered or thought of at all.* I suppose it was assumed that the Government would perform its contract, and yet, in view of the condition of the armor, it may have been realized at the time of making the contract that there was a great probability that it would not. I am not positive about that. (Q. 23, Rec. p. 56.)

The composite impression from the testimony of Gen. Tracy is that it is lacking in clearness as to what was the real purport of the sixth paragraph of the nineteenth article. It will be noted that he nowhere states what class of claims the release was to cover, and he admits that the phrases which he now attempts to interpret, came to his desk in stereotyped contract form. Finally, he was not sure whether the matter was in his mind at the time, or had come to his mind from his consideration of it 17 years later.

The testimony of Mr. Lewis Nixon is so unimpressive that it is not deemed necessary to comment at length upon it. He was an assistant naval constructor in the United States Navy, in charge of the plans and specifications under this contract, and was employed primarily to assist the Government in the preparation of specifications and in the construction of vessels,

and not to interpret contracts. He was not a lawyer and not experienced in matters of interpretation of the legal phraseology of contracts. He says, referring to releases of claims in the contract (Rec. p. 66):

> Q. Do you remember who framed that particular clause?
>
> A. Well, it was actually prepared, of course, by the Judge Advocate General of the Navy. I was in constant touch with him while he did it.

Both the question and answer were objected to by counsel for the Government.

It appears from the record that ex-Secretary Herbert, who was the official head of the department at the time the releases in question were signed and the *Massachusetts* and other vessels were completed, is an interested witness. He admitted, on cross-examination, that he was employed by appellant and had an interest in this case in that he had a "contingent fee" in it (Rec., p. 98). His interpretation, therefore, of the meaning of the terms of the release must necessarily be received, if at all, as that of a party in interest. He says that while the final release was prepared under his direction, it was done in that general way that contracts were prepared, and "I undoubtedly read it when the receipt was signed, but I do not think I could have considered that that applied to anything more than a general release of things that he was to do under the contract."

Mr. Herbert failed to state what matters and things were intended to be covered by the final release. It is a well-known fact, as testified to by Mr. Neagel and Mr. Stayton, who where law clerks in the office of the Judge Advocate General, that the legal phraseology of contracts with the Navy Department is drafted and emanates from the office of the Judge Advocate General, and not from the office of the Secretary of the Navy.

It is nowhere shown that either Messrs. Cramp, Tracy, Nixon, or Herbert had ever at any time considered or discussed the release clauses of the final release, or their ultimate scope or significance, excepting Mr. Cramp, who objected orally to signing it, and thereby put himself in the position of one who must have believed that they were all-inclusive. No one prior to its execution ever demanded the insertion of any proviso in the release excluding liquidated damages.

After a perusal of appellant's testimony the question still insistently arises without being answered: What was the mutual mistake?

Some time *after* the signing of the release the Secretary of the Navy sent to Congress the correspondence over this matter between himself and the appellant company. It has been suggested that this act was an admission of legal liability on the part of the Government. On the contrary, the very act indicates that he did not consider the appellant company had a right of recovery, either

at law or in equity; otherwise he would not have sent this matter to Congress but to the Court of Claims. If the doors of the Court of Claims were open, why appeal to Congress?

Finally a review of the evidence strengthens the conclusion that the Court of Claims was eminently correct in finding that there was no mutual mistake.

A PROFITABLE CONTRACT.

The testimony of Thomas J. Leger (Rec. pp. 208, 210), who was accountant and bookkeeper and later comptroller of the company during part of the period when the *Massachusetts* was being constructed and employed by the company for nineteen years previous thereto, reveals that appellant's financial troubles, which it claims were brought on by the Government and were the basis of its charge of duress, resulted, in fact, largely from gross mismanagement. He states (Rec. p. 210):

> The cause of the financial embarrassment between the period of October 5, 1894, and February 1, 1896, was due, in my opinion, to the following reasons: Unprofitable contracts, as before stated; payment of dividends to stockholders that were not earned; erection of new buildings and installation of new tools and machinery for the payment of which no funds had been provided; the lack of an efficient organization, making the cost of construction more than it should have been; and the withholding by the Government of payments on the *Indiana* and *Massachusetts*.

The testimony further shows that the contracts with the Government, including the building of the *Massachusetts*, produced a profit of from 20 to 25 per cent, and were the source from which appellant expected to recoup the losses sustained by it from outside contracts. The testimony of this witness removes all doubt of hardship placed upon appellant by the Government and utterly destroys the contention that the latter practiced coercion and duress to obtain the intermediate releases, or any of them.

CONCLUSION.

The Government rests its case upon the decisions in the cases of the *Indiana* and *Alabama*, found in 206 and 216 U. S. *supra*, and the findings in the case at bar to the effect that there was no mutual mistake and that the claims were not excluded from the wording of the release.

It is respectfully submitted that the decision of the court below should be sustained.

HUSTON THOMPSON,
Assistant Attorney General.

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